TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 156.

ROCHESTER RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

CITY OF ROCHESTER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED DECEMBER 4, 1905.

(20,003.)

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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 6th day of June in the year of our Lord one thousand nine hundred and five, before the Judges of said Court.

Witness, the Hon. Edgar M. Cullen, Chief Judge, presiding.

W. H. SHANKLAND, *Clerk.*

Amended Remittitur Oct. 18th, 1905.

THE CITY OF ROCHESTER, Appellant,
ag'st
ROCHESTER RAILWAY COMPANY, Respondent.

Be it remembered, that on the 22nd day of December in the year of our Lord one thousand nine hundred and four, The City of Rochester, the appellant in this action, came here into the Court of Appeals, by W. W. Webb, Corporation Counsel, its attorney, and filed in the said Court a notice of appeal and return thereto from the Judgment of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Rochester Railway Company, the respondent in said action, afterwards appeared in said Court of Appeals by Satterlee, Bissell, Taylor & French, its attorneys.

b Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. William W. Webb, Corporation Counsel, of counsel for the appellant, and by Mr. Charles J. Bissell, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Supreme Court appealed from in this action be reversed, annulled, and altogether held for nothing. And it was further ordered and adjudged that the Supreme Court award final judgment for the amount claimed in the complaint and for interest and costs.

And it was also further ordered that the record aforesaid and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be reversed, annulled and altogether held for nothing, and that the Supreme Court award final judgment for the amount claimed in the complaint and for interest and costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and

provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals
of the State of New York.

c COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *Oct.* 18*th*, 1905.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

[Seal of the Court of Appeals of the State of New York.]

W. H. SHANKLAND, *Clerk.*

d STATE OF NEW YORK:

In the Court of Appeals.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

Record on Appeal.

W. W. Webb, Corporation Counsel, Attorney for Appellant, Rochester, N. Y.
Satterlee, Bissell, Taylor & French, Attorneys for Respondent, Rochester, N. Y.

1 Supreme Court, Appellate Division, Fourth Department.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

Statement.

This action was commenced by the service of a summons and complaint on the defendant, on the 15th day of December, 1902. The answer was served December 24, 1902. There has been no change of parties. By an order of the Supreme Court granted January 14, 1904, W. W. Webb was substituted in place and stead of William A. Sutherland as attorney for the plaintiff.

Supreme Court, County of Monroe.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

To the Above Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney
2 within twenty days after the service of this Summons, exclusive of the day of service; and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial to be held in the County of Monroe.

Dated this 13th day of December, 1902.

WM. A. SUTHERLAND,
Corporation Counsel, Plaintiff's Attorney.

Office and P. O. Address, 48 City Hall, Rochester, N. Y.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

The City of Rochester, the plaintiff in the above entitled action, complains of the defendant, Rochester Railway Company, and alleges, that at all the times hereinafter mentioned, this plaintiff was and still is a municipal corporation organized and chartered and incorporated under and by virtue of and pursuant to the laws of the State of New York.

That during the times hereinafter mentioned, the defendant was, and still is, a street surface railroad corporation, organized,
3 chartered and incorporated under and by virtue of and pursuant to the laws of the State of New York, and having its principal place of business in said City of Rochester.

That the defendant, before any of the dates hereinafter mentioned, had constructed and operated, and during all the times hereinafter mentioned it continued to operate, a street surface railroad for public use in the conveyance of persons and property for compensation upon and along a number of the streets, avenues, roads and highways of the said City of Rochester, and among others, upon and along Park avenue and St. Paul street in said city; and that at all of the said dates and times the defendant had used and was continuing to use, and still uses, said street railway tracks in the said Park avenue and St. Paul street in the said City of Rochester.

That the Railroad Law of the State of New York, being Chapter 565 of the Laws of 1890, at § 98 in Article 4 thereof provides as follows:

"Every street surface railroad corporation, so long as it shall con-
" tinue to use any of its tracks in any street, avenue or public place
" in any city or village, shall have and keep in permanent repair that
" portion of such street, avenue or public place, between its tracks,
" the rails of its tracks and two feet in width outside of its tracks,
" under the supervision of the proper local authorities, and when-
" ever required by them so to do, and in such manner as they may
" prescribe. In case of the neglect of any corporation to make pave-
" ments or repairs after the expiration of thirty days' notice to do so,
" the local authorities may make the same at the expense of such cor-
" poration, and such authorities may make such reasonable regula-
" tions and ordinances as to the rate of speed, mode of use of tracks,
" and removal of ice and snow, as the interests or convenience of
" the public may require."

4 That afterwards, and in the year 1894, the said defendant made application in writing to the proper authorities of the City of Rochester, for a ratification and confirmation of the location of its tracks as operated and used through and along the various streets, avenues and highways in said application named, among others being the street known and hereinafter referred to as Park avenue, and the street known and hereinafter referred to as St. Paul street; and thereupon and after due consideration and after hearing all persons appearing before the Common Council pursuant to notice therefor, relative to said ratification and confirmation, the Common Council of the City of Rochester duly adopted resolutions with reference thereto, among which was the following:

"Resolved, That the location of the tracks of said Rochester Rail-
" way Company as now operated and used by said company in the
" streets, avenues and highways hereinafter named and as herein-
" after specifically described, is hereby ratified and approved, subject
" to such changes and alterations as the Common Council may from
" time to time direct, and subject to all the rights and privileges now
" possessed by the city under existing contracts or agreements or
" by law, nevertheless, upon the following conditions:

"First—That the provisions of Article 4 of the Railway Law of the
" State of New York, being an act in relation to railroads, constitut-
" ing Chapter 39 of the General Laws of the State of New York, be
" complied with;" and that thereupon the defendant and the plaintiff entered into a written agreement, under date of March 31, 1894, duly executed by and on the part of the defendant by its proper officers theretofore duly authorized for that purpose, whereby the defendant, Rochester Railway Company, did agree to and with the City of Rochester, this plaintiff, to accept, and in each and every thing and particular well and truly comply with each and all

5 of the provisions and conditions contained and made in the therein included and accompanying resolutions, being the resolutions hereinbefore recited. That in and by the terms of the said resolution and of the said written contract, the tracks of the defendant were described as then existing upon all parts of the said Park avenue and the said St. Paul street, which are hereinafter referred to as having been subsequently improved and repaved.

That afterwards, and in the year 1899, the defendant, Rochester Railway Company, requested of the proper local authorities of the City of Rochester, consent to construct, maintain and operate an extension of its street railroad upon the surface of, through and upon a certain street and avenue in said city of Rochester, being the street and avenue named in said written application. That thereafter and on or about August 15, 1899, the said consent of the proper city authorities was duly granted, upon condition, however, in said consent contained in these words: "That the consent "hereby granted is granted upon the express condition that the pro- "visions of Article 4 of an act in relation to railroads, constituting "Chapter 39 of the General Laws of the State of New York, and the "acts amendatory thereof, be complied with." That thereupon the defendant, Rochester Railway Company, accepted said consent, subject to said express condition above quoted.

That thereafter, divers questions having arisen between the plaintiff and the defendant, as to the rights and liabilities of the parties under said Article 4 of the said Railroad Law, a contract was duly entered into between the parties hereto, in the year 1901, which provided among others at its third clause as follows: "That as to claims "which may hereafter be made by the city against the Railway "Company for all pavements hereafter made in the streets or parts
"of streets within said city, in which the Rochester City and
6 "Brighton Railroad Company obtained its franchise or con-
"structed a railroad prior to the 7th day of May, 1884, the "question of the liability of the railroad company to pay for making "pavements in such streets or parts of streets, between its tracks, the "rails of its tracks and two feet outside, or any part thereof, shall "be litigated and determined in a court having jurisdiction; such "questions to be raised as speedily as possible, in such manner as "may be agreed upon by the Corporation Counsel of the city and "the counsel of the railway company, and such questions to be "finally judicially determined in the courts."

II.

The plaintiff further complaining of the defendant, alleges that on or about the 17th day of July, in the year 1900, it became and was necessary to repair, repave or construct a new pavement and adjustment of the same to grade, in Park avenue, in the City of Rochester aforesaid, and the proper authorities of the said city did, after due notice given pursuant to the statutes and ordinances and contracts thereunto relating, proceed with the said repaving and new pavement and adjust the same to grade in said Park avenue in said city, and this defendant neglected for the said thirty days and refused after due notice to make said pavement or repavement, and this plaintiff necessarily incurred an expense of thirty-eight hundred dollars ($3,800) in so repaving the said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 2d day of December, in the year 1901; and that this plaintiff necessarily in-

curred an expense of five hundred fifty-six dollars and twenty-four cent- ($556.24) in so repaving said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the
7 18th day of January, 1902. That though often requested so to do, the said defendant has not paid the plaintiff the said sum of $4,356.24 or any part thereof.

Second.

For a second and further cause of action, the plaintiff repeats and reaffirms all of the allegations in the first cause of action down to the second subdivision thereof, at folio 14, and makes the same a part of this cause of action.

II. Further complaining of the defendant, the plaintiff alleges that on or about the 24th day of April, 1900, it became and was necessary to repair, repave, or construct a new pavement and adjust the same to grade in St. Paul street in the City of Rochester aforesaid, and the proper authorities of said city did, after due notice given pursuant to the statutes and ordinances and contracts thereunto relating, proceed with the said repaving and new pavement and adjustment of the same to grade, and did repave and construct a new pavement and adjust the same to grade in said St. Paul street, in said city, and this defendant neglected for the said thirty days, and refused after due notice, to make said pavement or repavement, and this plaintiff necessarily incurred an expense of four thousand two hundred dollars ($4,200) in so repaving said street between the tracks of the defendant, the rails of its tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 30th day of September in the year 1901; that this plaintiff also necessarily incurred an expense of five thousand two hundred and fifty dollars in so repaving said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 23d day of November, in the year 1901; and that this plaintiff also necessarily incurred an expense of four thousand four hundred and fifty-seven dollars
8 and seventy-eight cents ($4,457.78) in so repaving said street between the tracks of the defendant, the rails of its said tracks and two feet in width outside of its tracks, which expense was incurred and paid on the 21st day of February, in the year 1902. That though often requested so to do, the defendant has not paid the plaintiff the said sum of $13,907.78, or any part thereof.

Wherefore, plaintiff demands judgment against the defendant for $18,274.02, with interest on $4,200 thereof from September 30, 1901; on $5,250 thereof from November 23, 1901; on $3,800 thereof from December 2, 1901; on $556.24 thereof from January 18, 1902; and on $4,457.78 thereof from February 21, 1902, together with the costs of this action.

WILLIAM A. SUTHERLAND,
Corporation Counsel, Attorney for Plaintiff,
46 *City Hall, Rochester, N. Y.*

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

A. J. Rodenbeck, being duly sworn, deposes and says that he is the Mayor of the City of Rochester, the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. J. RODENBECK.

Sworn to before me this 13th day of December, 1902.

F. X. PIFER,
Com. of Deeds.

9 Supreme Court, Monroe County.

THE CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

The above named defendant, for an answer to the complaint of the plaintiff herein, and for an answer to each of the several causes of action therein stated and set forth, admits that the Railroad Law of the State of New York contains the provision as set forth in the complaint.

It admits that in the year 1894 defendant made application in writing to the proper authorities of the City of Rochester for a ratification and confirmation of the location of its tracks, as operated and used through and along the various streets, avenues and highways in said application named, among others being the street known as Park avenue, and the street known as St. Paul street, and in this connection the defendant alleges that such application in writing was presented to the Common Council of the City of Rochester on the 11th day of December, 1894, and the streets named in such written application constituted all the streets, avenues and highways in the City of -ester in which the defendant had constructed and was then operating a street railway, and the defendant craves leave to refer to said petition and to the whole thereof, with the same force and effect as if the same were herein set forth at large.

And the defendant admits that after the presentation of said petition, and after due consideration, and after hearing all persons appearing, the Common Council adopted resolutions with reference thereto; that among such resolutions was the provision set
10 forth in the complaint herein. And this defendant in this behalf alleges that such resolutions were passed by the Common Council of the plaintiff on the 31st day of December, 1894, and contained other provisions than those set forth in the complaint, and this defendant craves leave to refer to said resolutions with the same force and effect as if the same were herein set forth at large. And the defendant admits that thereupon, and pursuant to said resolutions, the defendant and the plaintiff entered into a written agreement,

bearing date December 31, 1894, duly executed by and on the part of the defendant, by its proper officers theretofore duly authorized for that purpose, and that in and by said agreement the defendant agreed with the plaintiff to accept, and in each and every thing and particular well and truly comply with each and all the provisions and conditions contained and made in the therein included and accompanying resolutions, being the resolutions of December 31, 1894; and that in and by the terms of the said resolutions, and of the said written contract, the tracks of this defendant were described as then existing upon all the parts of Park avenue and St. Paul street which are referred to in the complaint, as having been subsequently improved and re-paved, but the defendant in this behalf alleges that the said contract contained many other provisions than such as are quoted and referred to in the complaint, and this defendant craves leave to refer to said contract with the same force and effect as if the same were herein set forth fully and at large.

The defendant further admits that in the year 1899 it requested from the proper local authorities of the City of Rochester consent to construct, maintain and operate an extension of its street railroad upon the surface of, through and upon a certain street and avenue in the City of Rochester, being the street and avenue named in its written application; that thereafter and on or about August 15, 1899, the said consent of the proper city authorities was duly
11 granted, upon the condition which is partially quoted in the complaint, and in this behalf the defendant alleges that such condition is not quoted in full in the complaint, and it hereby craves leave to refer to the ordinance and resolution of the Common Council dated the 15th of August, 1899, with the same force and effect as if the same were herein set forth at large.

And this defendant denies that after the passage of such resolution, this defendant accepted said consent, subject to the condition referred to, or to any condition contained in such resolution, and denies that it in any manner constructed its road, or in any wise acted upon said resolution.

It admits that in the year 1901 divers questions had arisen between the plaintiff and defendant as to the rights and liabilities of the parties under Article 4 of the Railroad Law, and also, as the defendant alleges, under other statutes of the State of New York, and admits that the contract was duly entered into between the parties hereto in the year 1901, and contained among other provisions the provision set forth in the complaint herein, but in this behalf the defendant alleges that such contract contained many other provisions between the parties, and the defendant craves leave to refer to said contract and the whole thereof with the same force and effect as if the same were herein set forth fully and at large.

And this defendant further alleges in this behalf that such contract was duly confirmed by the Legislature of the State of New York by the provisions of Chap. 562 of the Laws of 1901.

And this defendant further answering the complaint herein and the several causes of action therein set forth, denies that it has any knowledge or information sufficient to form a belief as to whether on

or about the several days set forth in the complaint, or at any
12 other time, it became or was necessary to repair, repave or construct new pavement or adjust the same to grade in Park avenue or in St. Paul street in the City of Rochester.

It admits that on or about the times alleged in the complaint, the plaintiff did proceed with re-paving and making a new pavement, and adjusting the same to grade, and did re-pave and construct a new pavement and adjust the same to grade in Park avenue and in St. Paul street in said city; but this defendant denies upon information and belief that either of said new pavements or adjustments to grade were made after due notice given pursuant to the statutes, ordinances or contracts thereunto relating, and this defendant denies that it neglected for thirty days, or refused after due or proper or legal notice, to make said re-pavements in either of said streets.

And this defendant denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff necessarily incurred an expense amounting to the several sums set forth in the complaint in re-paving Park avenue between the tracks of the defendant, the rails of its said tracks, and two feet in width outside of said tracks. And the defendant denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff necessarily incurred the expenses in re-paving St. Paul street between the tracks of defendant, the rails of its tracks, and two feet in width outside of its tracks, referred to and set forth in the complaint.

And it denies that it has any knowledge or information sufficient to form a belief as to whether the plaintiff paid the several sums set forth and alleged in the complaint in both of the causes of action at the times mentioned in said complaint, or at any time.

And this defendant denies that it has any knowledge or information sufficient to form a belief as to what was the reasonable
13 cost and worth of the pavements and adjustments to grade alleged to have been made in the several causes of action stated in the complaint, or what was the reasonable worth or expense incurred of either of them.

II.

And for a second, separate and further defense to each of the causes of action set forth in the complaint, this defendant upon information and belief alleges:

First—That the defendant is a domestic street surface railroad corporation, duly incorporated under an act of the Legislature of the State of New York, entitled "An Act to provide for the construction, extension, maintenance and operation of street surface railroads and branches thereof, in cities, towns and villages," passed May 6, 1884, said Act being known as Chap. 252 of the Laws of the State of New York of that year. And the defendant further alleges that under and pursuant to the provision of said Act, it filed its Articles of Association in the office of the Secretary of State of the State of New York on the 25th day of February, 1890, and that the route designated in its Articles of Association comprises, with other routes, the route designated in the Articles of Association of the Rochester City & Brighton Railroad Company hereinafter mentioned, and included

both of the streets mentioned and referred to in the complaint herein.

Second—That at the dates and times for that purpose hereinafter mentioned, the Rochester City & Brighton Railroad Company was a domestic railroad corporation duly incorporated on or about May 31st, 1862, under and pursuant to the provisions of an act of the Legislature of the State of New York, entitled "An Act to authorize the formation of railroad corporations and to regulate the same," passed April 2nd, 1850, and the several acts amendatory thereof, said Act of 1850 being known and designated as Chapter 140 of
14 the Laws of the State of New York of that year.

Third—This defendant further alleges, upon information and belief, that on the 24th day of June, 1862, pursuant to the provisions of the said Act of 1850 in such case made and provided, the Common Council of the City of Rochester granted, by resolution and ordinance, to the said Rochester City & Brighton Railroad Company, its assent to the construction, maintenance and operation of its railroad in and through the streets and avenues in the City of Rochester designated in its Articles of Association.

This defendant further alleges that in and by said resolution and ordinance it was, among other things, provided as follows:

"Resolved, That the Common Council of the City of Rochester "will permit to be constructed in said city by the Rochester City & "Brighton Railroad Company, a corporation organized under and "by the authority of the general railroad law, passed April 2, 1850, "and the several acts amending the same, a railroad which shall "commence in the Town of Brighton, Monroe County, to run along "the Brighton road to East avenue in said city; along East avenue, "Main and Buffalo streets and West avenue to the Town of Gates; "also from East avenue along and through Prince street to University "avenue, and through University avenue to Main street; also, from "University avenue along Main street to East avenue; also, from the "Town of Brighton through Mt. Hope avenue to and through Clarissa to Greig street; also, through Greig street to and through "Plymouth avenue to Buffalo street; also, from Clarissa street to and "through Exchange street to Buffalo street; also, from Buffalo street "through State street and Lake avenue, so-called, into the Town of "Greece; also, from the junction of Clarissa street and Mt. Hope "avenue through said avenue and through South and North St.
"Paul streets to the Town of Irondequoit; also from Main
15 "street through Clinton street to Monroe avenue, and through
"Monroe avenue to and through Alexander street to East "avenue; also, from Main street through North Clinton street to the "Town of Irondequoit. To be constructed, established, maintained "and operated upon the terms, conditions and stipulations herein-"after prescribed."

"SECTION 2. The track of said railroad shall be so laid as to per-"mit the free passage of vehicles and carriages over the same, and "the rails shall be laid even with the surface of the streets, and shall "conform to the grades thereof as now established, or as they shall "from time to time be established or altered. Said company shall, "under the direction of, and as required by, the Common Council

"of the City of Rochester, improve, with such suitable material as "said Common Council shall direct, and in a proper manner between "the rails and for two feet and four inches outside thereof, and shall "keep the surface of the street inside the rails and for two feet and "four inches outside thereof in good repair, and all dirt and filth "removed therefrom as may be directed and required by the said "Common Council."

Fourth—This defendant further alleges upon information and belief that on or about the 16th day of October, 1862, the said Rochester City & Brighton Railroad Company duly executed and delivered to Hobart F. Atkinson, as trustee, a mortgage of all its property, rights, privileges and franchises to secure an issue of bonds of the face value of one hundred thousand dollars, which mortgage was duly recorded in the office of the Clerk of the County of Monroe in the State of New York, in Liber 108 of Mortgages, at page 217, and that thereafter default having occurred in the fulfillment of the conditions of said mortgage on the part of said mortgagor, an action was duly commenced by said Hobart F. Atkinson, as trustee, in the Supreme Court of the State of New York, for the foreclosure of
16 said mortgage, and that such proceedings were thereafter duly had in such action as that a decree of foreclosure of said mortgage and for the sale of the mortgaged property, franchises and rights and privileges of the said Rochester City & Brighton Railroad Company was duly made and entered in said Supreme Court, and on or about the 28th day of February, 1868, under and pursuant to said decree, said property, rights, privileges, franchises and interests of said Rochester City & Brighton Railroad Company were duly sold and the same were duly purchased by Chauncey B. Woodworth, to whom the same was duly conveyed by the officer making such sale, which conveyance is duly recorded in the office of the Clerk of the County of Monroe, and thereupon the said Chauncey B. Woodworth became and was the owner of all the property, rights, privileges, franchises and interests of the said Rochester City & Brighton Railroad Company.

This defendant further alleges, upon information and belief, that on or about March 5, 1868, the said Chauncey B. Woodworth, purchaser at said foreclosure sale, pursuant to the statutes of the State of New York in such case made and provided, duly associated with himself as such purchaser at such foreclosure sale certain individuals, and duly filed in the office of the Secretary of State articles of association, reciting, among other things, as follows:

"Now, therefore, the persons whose names are subscribed hereto "hereby associate themselves together and form a company by the "name of the Rochester City & Brighton Railroad Company for "the purpose of making and operating the railroad in the City of "Rochester heretofore constructed, maintained and operated by the "said Rochester City & Brighton Railroad Company, a corporation "organized as aforesaid on the 31st day of May, 1862, in and
"through the streets wherein the said railroad is now laid
17 "and run and in and through such other streets as the public "interests may hereafter require, with such other tracks, side

" tracks, switches, and turnouts as such public interests may from " time to time demand.

" The said Company is to continue ninety-nine years."

Fifth—This defendant further alleges, upon information and belief, that immediately after the incorporation of the Rochester City & Brighton Railroad Company by the said purchaser at said foreclosure sale and his associates, the said railroad company duly petitioned the Common Council, protesting against the onerous conditions of Section 2 of the said resolution of 1862 granting the assent of the Common Council, and setting forth the inability of the new corporation to proceed with the operation of the railroad subject to such conditions, and the fact that the road had never paid owing to the existence of such conditions, and thereupon the Common Council of the City of Rochester on the 12th day of January, 1869, duly amended the last clause of said Section 2 of that ordinance so as to read as follows:

"Said company shall, as soon after the adoption of this ordinance " as the condition of the streets through which their tracks *is* laid will " permit, put the surface of the streets inside the rails and for one " foot outside the rails thereon in good and thorough repair, under " the direction of the Committee on Streets and Bridges of the Common " Council, and shall thereafter keep said street in good repair inside " and between the rails of their tracks only during the term of five " years, and whenever it becomes necessary to improve by ordinance, " or otherwise, any of the streets through which their track is laid by " a new or permanent improvement, said company shall not be " required to make any part or portion thereof, nor bear any part
" or portion of the expense of making the same during the
18 " term of five years from the adoption of this ordinance."

Shortly after the adoption of this resolution by the Common Council of the City of Rochester, an Act was agreed upon by the Common Council and approved by the Mayor of the City of Rochester and by the said Rochester City & Brighton Railroad Company and transmitted to the Legislature of the State of New York for enactment by it.

On or about the 12th day of February, 1869, said act was passed by the Legislature of the State of New York and duly signed by the Governor of said State, and is entitled "An Act for the relief of the Rochester City & Brighton Railroad Company," and is known and design-ed as Chapter 34 of the Laws of the State of New York for the year 1869.

A copy of said act is hereunto annexed, marked "A," and made a part of this answer.

Sixth—This defendant further alleges upon information and belief, that in or about the year 1889, the Rochester City & Brighton Railroad Company duly petitioned the Common Council of the City of Rochester for permission to change its motive power from horse to the overhead system of electricity, commonly known as the trolley system.

That the prayer of said petition was duly granted by the municipal authorities of the said City of Rochester, and on or about the 10th

day of February, 1890, the Common Council of said city duly adopted the resolutions which are set forth in full in the contract which is hereto annexed and marked "B," which said contract and resolutions are hereby made a part hereof, and said resolutions were duly approved by the Mayor of said city.

That within the time prescribed by said resolutions the Board of Directors of the Rochester City & Brighton Railroad Com-
19 pany duly adopted a resolution accepting in all things the grant contained in said resolutions of the Common Council, and agreeing to abide by the same, and a certified copy of said resolution was delivered to the City Attorney of the City of Rochester, and duly approved by him and filed in the office of the Clerk of the City of Rochester. That on the 25th day of February, 1890, the Rochester City & Brighton Railroad Company duly executed the contract containing a copy of said resolution of the Common Council, which contract is hereto annexed, marked "B," as hereinbefore stated, and the City Attorney of the City of Rochester duly approved said contract, and the same was duly filed in the office of the Clerk of the City of Rochester.

Seventh—This defendant further alleges, upon information and belief, that the terms and obligations of said resolutions contained in the contract hereto annexed, marked "B," were duly accepted and performed by the Rochester City & Brighton Railroad Company in the manner and form as in the resolutions provided.

That thereafter and on or about the 25th day of February, 1890, the Rochester City & Brighton Railroad Company last above mentioned duly executed and delivered to this defendant a lease, under the corporate seal of said company, of all its property, franchises, rights and privileges, of every kind and description, for the unexpired term of its charter, pursuant to the provisions of the statutes of the State of New York in such case made and provided. That such lease was duly executed under the corporate seal of this defendant and duly submitted to the stockholders of each of said companies at a meeting thereof called separately for the purpose of taking the same into consideration. Due notice of the time and place of holding said meeting and the object thereof was duly given to the stockholders of each of said companies by written or printed notice in the manner and form as by said statutes provided; that said
20 meeting of said stockholders was duly held and said lease was duly adopted, ratified and approved by the votes of stockholders cast in person or by proxy at such meeting.

This defendant duly accepted said lease and thereupon entered into the possession of the demised railroads and property.

Eighth—This defendant further shows upon information and belief that subsequent to said lease and in the year 1890, this defendant, being the lessee of the Rochester City & Brighton Railway Company, duly acquired, pursuant to the statutes of the State of New York in such case made and provided, the entire capital stock of the Rochester City & Brighton Railroad Company, which said capital stock was duly surrendered and transferred

to this defendant and a certificate of such surrender and transfer was duly filed in the office of the Secretary of the State of New York under the common seal of this defendant, to whom such surrender or transfer had been made, and thereupon, pursuant to the statutes of the State of New York in such case made and provided, the estate, property, rights, privileges and franchises of the Rochester City & Brighton Railroad Company were vested in this defendant and are now held and enjoyed by it as fully and entirely and without change or diminution as the same was before held and enjoyed by the said Rochester City & Brighton Railroad Company.

Ninth—That thereafter and in the year 1890, this defendant, pursuant to the statutes of the State of New York, applied to the Board of Railroad Commissioners of the State of New York for permission to change the motive power of the railroad so acquired by it, and of such extensions thereof as were contemplated and as were embraced in its articles of association and in said Act of 1869, from horse power to electricity, and such proceedings were thereupon had that in said year the Board of Railroad Commissioners of the State
21 of New York duly granted such permission to this defendant, and thereafter this defendant, at great expense, proceeded to and did reconstruct the entire railroad of the Rochester City & Brighton Railroad company acquired by it as aforesaid, and equipped the same with electrical appliances.

That in making such change of motive power to electricity as aforesaid, it became and was necessary for this defendant to, and this defendant did, reconstruct in its entirety the road so acquired by it as aforesaid, including the replacing of the ties, rails and foundation with new material and the replacing of all the cars with new motor cars, and this defendant further shows that since the making of the said contract of February 25, 1890, up to the time of the lease to this defendant from the Rochester City & Brighton Railroad Company, the said Rochester City & Brighton Railroad Company duly complied with and performed all the conditions of said contract by it to be performed, and that since the making of said lease this defendant has duly complied with and performed all the conditions and obligations of said contract on its part to be performed.

Tenth—This defendant further alleges that in making the said lease and in acquiring the capital stock of the Rochester City & Brighton Railroad Company and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the reconstruction and re-equipment thereof, this defendant has expended upwards of Four Million Dollars, and that such expenditure was made by this defendant in reliance upon the provisions of said Act of 1869, and in reliance upon said contract, Exhibit "B" hereto annexed, with the said City of Rochester and the resolutions therein embraced, and this defendant further shows that since the passage of said Act of 1869, entitled "An Act for the relief of the
22 Rochester City & Brighton Railroad Company," and up to the year 1899, neither the said Rochester City & Brighton Railroad Company, nor this defendant, has ever been assessed for, or required to pay, any portion of the expense of the permanent im-

provement of any portion of any street, avenue or highway included within the route of its street railroad within the City of Rochester.

And this defendant, upon information and belief, further alleges that after the passage of the Act of 1869, and up to the time of the making of the contract, a copy of which is hereto annexed, marked Exhibit "B," the Rochester City & Brighton Railroad Company had fully complied with the provisions of the Act of 1869 in keeping in repair that portion of the pavement in the streets in which its tracks were laid prescribed in said act, and that since the making of said contract, Exhibit "B," the said Rochester City & Brighton Railroad Company, and this defendant, had fully complied with all the provisions of said contract, including the keeping in repair of said portions of the streets in which its tracks were laid as were required to be kept in repair by the terms of such contract, and in all other respects, and said Rochester City & Brighton Railroad Company and this defendant have fully performed every covenant in said agreement on the part of said Rochester City & Brighton Railroad Company to be performed.

Eleventh—And this defendant further alleges upon information and belief, that prior to the passage of Chapter 252 of the Laws of 1884, the Rochester City & Brighton Railroad Company duly acquired a franchise in those portions of the several streets named and referred to in the several causes of action set forth in the complaint, and in those portions of said streets which are claimed in the several causes of action set forth in the complaint to have been paved by the City of Rochester, and prior to the passage of said act had
23 constructed its railroad in said portions of said streets and was engaged in the operation thereof.

Twelfth—And this defendant further alleges, upon information and belief, that the sole authority for charging this defendant with any portion of the expense referred to in the first cause of action, if any such authority exists, is found in the provisions of Section 98 of the Railroad Law, being Chapter 39 of the General Laws of the State of New York, being Chapter 565 of the Laws of 1890, as amended, which provision of the Railroad Law was enacted long subsequent to the passage of said Act of 1869, a copy of which is hereto annexed, and long subsequent to the making of the contract, a copy of which is hereto annexed, marked Exhibit "B."

And this defendant avers that if said section of the Railroad Law and the provisions thereof, charge this defendant with the expense mentioned and referred to in said several causes of action set forth in the complaint, or any part thereof, then said provision of the Railroad Law is violative of the provisions of subdivision 1 of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts and is violative of the provisions of Section 1 of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law.

And this defendant further alleges, upon informaton and belief, that if it is charged with the expense mentioned and referred to in the said several causes of action set forth in the complaint or any

part thereof, and made liable therefor, it will result in taking the private property of this defendant for public use, without compensation, in violation of the provisions of the Constitution of the United States.

Thirteenth—And this defendant, upon information and belief, further alleges that at the time of the alleged passage of the
24 ordinances referred to and the alleged service of the notices referred to, and the alleged making of the improvements referred to in each of the causes of action set forth in the complaint, the charter of the City of Rochester, which is a public act, provided in substance that the Common Council of the City of Rochester should have the power to cause the grading, repairing, cleaning, macadamizing or paving of any of the streets in the said city. That whenever, by order of the Common Council, any public improvement, such as paving a street, is to be made, it should be the duty of that body to determine what portion, if any, of the expense thereof, ought to be paid from the city treasury; and what portion, if any, ought to be paid by a local assessment, and to direct that the expense to be paid by local assessment shall be assessed upon all the lots and parcels of lands in proportion to the benefit which each would derive therefrom.

It was further provided by said charter, that before the Common Council shall determine to make any such public improvement, they should cause an estimate thereof to be made and by an entry in their minutes, describe that portion of the city which they deem proper to be assessed for the expense of such improvement, and shall cause a notice to be published in at least two of the daily newspapers printed in the City of Rochester, four days, which notice shall specify such improvement; the estimated expense thereof; the amount to be paid from the public treasury, and the amount to be assessed for the rest of the expense, and shall require all persons interested in such improvements to attend such council at the time appointed in such minutes.

It was further provided that at the time appointed in such notice, the council shall proceed to hear the allegations of owners and occupants of houses and lots situated in the portion of the city
25 so described as aforesaid, and after hearing the same, shall make such further order in respect to such improvement as they shall deem proper.

The charter then provides for the making of the improvement in accordance with the determination of the Common Council, the making of the assessment roll, of the assessment and the collection thereof.

And this defendant further alleges, upon information and belief, that no notice whatever was given to this defendant, nor was any public notice whatever given, of the intention of the Common Council to pass upon and determine the question of the necessity of paving, or repairing, or adjusting to grade, either of the streets or avenues referred to in either of the causes of action set forth in the complaint, nor does Section 98 of the Railroad Act hereinbefore referred to, provide for giving any such notice, and this defendant avers,

upon information and belief, that if said Section 98 of the Railroad Law charged, or renders this defendant liable for, the expense incurred by the plaintiff, mentioned and referred to in either of the causes of action set forth in the complaint, or any part thereof, it violates the provision of subdivision 1 of Article 14 of the Constitution of the United States, in that it denies to this defendant, being within the jurisdiction of the State of New York, the equal protection of the law.

Wherefore, the defendant demands judgment that the complaint herein may be dismissed with costs.

SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Defendant,
9th Floor Germ. Ins. Bld., Rochester, N. Y.

26 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Tom J. Nicholl, being duly sworn, says: I am the Vice-President and General Manager of the defendant; the foregoing answer therein is true to my own knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

T. J. NICHOLL.

Sworn to before me this 23rd day of December, 1902.
CHAS. A. EDGERTON,
Com'r of Deeds.

"A."

CHAP. 34.

An Act for the Relief of "The Rochester City & Brighton Railroad Company."

Passed February 27, 1869.

The People of the State of New York, represented in Senate and Assembly do enact as follows:

SECTION 1. The Rochester City & Brighton Railroad Company is hereby authorized and empowered to maintain and operate a railroad in all of the streets of the City of Rochester in which it has a track now laid, and with the permission of the Common Council of said city, in such other streets in said city as it shall elect to use for that purpose; and with the consent of said Common Council to lay a double track in any such street or streets, and the said Company shall not be bound or required to construct and operate a railroad in any street of said city where there is now no track.

27 SEC. 2. Said company, by and with the consent of the Common Council of said city, may at any time hereafter, abandon

the use of any street now used, or which may hereafter be used by it for the operation of its road, and upon such abandonment shall take up its track and restore such street to as good condition as it was before the removal of such track.

SEC. 3. The right to use any real estate or interest therein which the said company has not acquired, and which may be required for the purpose of constructing or operating said road, as hereinbefore authorized, may be acquired by said company in the manner specified in the fourteenth, fifteenth, sixteenth, nineteenth, twentieth and twenty-first sections of the act entitled "An Act to authorize the formation of railroad corporations, and to regulate the same," passed April second, eighteen hundred and fifty, except that all the proceedings for any of the purposes authorized by this section, may be had either in the County Court of Monroe County, or in the Supreme Court; and in the petition to the court it shall not be necessary to make any allegations of or reference to any incorporation, capital stock, survey or maps, or of the filing of any certificate of location. And the notices to be published as provided in subdivisions two and five of section fourteen of said act, need not be published in the State paper; and the Court shall appoint three disinterested and competent persons, who reside in the County of Monroe, to act as commissioners, instead of five persons being appointed in the manner provided in section fifteen of this act.

SEC. 4. Said company may, and is hereby authorized to charge, collect and receive from each and every passenger for riding any distance upon its said road, towards or from the intersection of Buffalo street with State and Exchange streets, in said city, the sum of five cents, except that children under twelve years of age shall only be required to pay three cents fare, and children under five
28 years of age, accompanied by parents or other persons having them in charge, shall ride free.

SEC. 5. Said company shall put, keep and maintain the surface of the streets inside the rails of its track, in good and thorough repair, under the direction of the committee on Streets and Bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof.

SEC. 6. This act shall not be construed as in any way impairing the force or effect of the resolution or ordinance of the Common Council of the City of Rochester, entitled "An ordinance in relation to street railroads," passed June twenty-fourth, eighteen hundred and sixty-two, and the amendments thereof, except as it is herein specifically provided.

SEC. 7. This act shall take effect immediately.

"B."

An Agreement, made and entered into at Rochester, New York, on the twenty-fifth day of February, 1890, by and between The Rochester City & Brighton Railroad Company, of Rochester, N. Y., of the first part, and the City of Rochester, a municipal corporation, of the second part, witnesseth as follows:

The said party of the first part does hereby agree to and with the said party of the second part to accept, and in each and every thing and particular comply with, each and all of the provisions contained and made in the following or accompanying resolutions, and the amendments thereto, as adopted by the Common
29 Council of said city on the eighteenth inst., and will pay, at the time or times, and in the manner specified in said resolutions and amendments, the sum or sums of money therein specified, and will, well and truly, at any and all times hereafter, indemnify and protect the said city in the particulars and manner specified in the said resolutions and amendments, and will, well and truly at any and all times, comply with all ordinances and resolutions of said Common Council, not in conflict with said resolutions and amendments, which have been at any time heretofore, or may be at any time hereafter passed, relating to the rate of speed, manner of running cars, general government or use of tracks, removal of ice, snow or dirt, and the general repairs of the streets within and for two feet outside of, and adjoining said company's track or tracks.

Resolved, That the consent and permission of the City of Rochester is hereby granted to the Rochester City & Brighton Railroad Company, its successors and assigns, in addition to the rights, privileges and franchises now possessed by it, to establish, construct, maintain, operate and use the overhead single trolley electric system of motive power, so-called, in the operation of its cars in and upon each and all of the streets, avenues, and public places in the City of Rochester in, along, through and upon which said company has constructed and is now maintaining and operating a street surface railroad, and to construct, set, lay, maintain and use the poles, wires, appliances, and such electrical appliances and apparatus, and to make the underground and surface alterations in and on each and all of the said streets, avenues and public places, so far as necessary for that purpose; but said company, its successors and assigns, shall not have the right to construct and operate said electric railroad in any street until the requisite consents of property owners on such street, avenue or place, and the consent of the Board of Railroad Commissioners of the State of New York shall be obtained as
30 required by law; nor shall any railway or any part or portion of the street surface or sidewalk of any street, avenue or place, be seriously and permanently interfered with, without consent first being had and obtained from the Executive Board of said city, nor shall any sewer or lateral sewer, water pipe or lateral water pipe, or other public underground conduit, be interfered with without such consent first being had.

It is further resolved, that all work of construction and maintenance authorized by this resolution, and all kind and quantity

of material used, and the height, material, form and shape of all poles erected, shall be satisfactory to the special committee of the Common Council of the City of Rochester, on change of motive power of said railroad to electricity, and to its successor, and that the consent and permission hereby granted is subject to the conditions, terms and limitations hereinafter set forth and described, to wit:

First—The single trolley electric system shall be adopted by said company; the trolley wire shall be supported over the center of each track by (1) cross or suspension wires attached to poles placed at or near the curb lines of the streets, or (2) by brackets extending from the poles placed at or near such curb lines, or (3) in such other manner as shall be approved by the said committee. The cross or suspension wires shall be of not less strength than No. 9 iron wire.

Second—Feed wires shall be used, so far as necessary for the operation of the system, in whole or in part, and shall be placed upon the poles to be erected as hereinafter specified, except that the main feed wires, to convey the electric current from the power station to the railroad lines, may be placed upon poles already erected, in case consent be obtained from the said committee, and from the company or companies which have erected or may erect such poles, or upon poles which said railroad company may erect for the purpose, under
31 the direction of said committee, but in the latter case, each and all of said poles shall be erected at or near the curb lines of the streets or avenues. The feed wires used shall be of such number, and their location shall be as approved by said committee, and all feed wires shall be placed on poles as directed by said committee.

Third—The feed wires used shall be wires having the best insulation at any and all times, and all wires used by said company as feed or trolley wires, shall be so placed as to be suspended at least eighteen feet above the surface of the street or avenue, except that a less elevation may be allowed by said committee in passing under bridges or along any street or avenue where necessary.

Fourth—All wires used, except the cross or suspension wires, shall be copper or composition, and supported in such manner as to render the overhead construction strong and free from danger of accident. Whenever required by said committee, the said company shall place guard wire, to prevent the trolley wire from coming in contact, by reason of accident breakage, or otherwise, with electric, telephone, or other wires, and said company shall at all times cause to be maintained sufficient electric current through the guard wires, to ring a bell at the central station, in the event of any wire falling or coming in contact with such guard wire.

Fifth—The poles shall be of wood or iron and each pole erected shall be straight; if of wood, each pole must be pine sawed eight — square, and of such height and dimensions as shall be approved by said committee. Each pole, whether of wood or iron, shall be painted, and at all times kept painted. Each wooden pole shall be set at least six feet below the surface of the street, the distance between the poles shall be at least 100 feet, except on curves, where a less distance between poles may be allowed by said committee, when necessary to insure strong and permanent overhead construction.
32 Said railroad company, its successors and assigns, shall change the location of poles whenever required by said com-

mittee. Said poles shall be used exclusively to string wires thereon, and to support wires thereby for the construction and maintenance of the single trolley, electric system for street railway propulsion; except that the City of Rochester shall have the right to string and maintain wires on said poles for city signal and municipal purposes only.

Sixth—The electric current which said company may use in the operation of its road shall not exceed 500 volts; but said company, its successors and assigns, shall not use the alternating current for the operation of said overhead system, except with the consent of said committee. The said city may, at any time, test and measure the electric current used by said company.

Seventh—Said committee shall have general charge and supervision of the kind and quality of poles to be erected, location of same, and the work of construction by said company.

Eighth—The said city, by its officers of the Fire Department, or Mayor, or a member of the Executive Board, in case of a fire at any time, may cut or otherwise remove any of the wires or poles of said company, wherever necessary, to afford convenient and unobstructed access to and egress from the place of any such fire.

Ninth—Whenever any building is moved through any of the streets or avenues, along or upon which any of said company's wires are strung or poles erected, said company shall, at any time, when directed by said committee, change said wires so as to permit the free and unobstructed use of such street or avenue, for the purpose of moving said building along or upon the same.

Tenth—None of said poles or wires of said company shall,
33 at any time, be erected or strung so as to injuriously interfere with any of the poles, wires or other apparatus connected with the public street lighting, police patrol, or fire alarm systems of said city.

Eleventh—The said construction and maintenance of the said railroads shall at any and all times hereafter be subject to each and all of the conditions hereof, and all work done and materials used at any and all times, in such construction and maintenance shall be in a thorough, workmanlike manner and first-class quality, and suitable in all respects for the purposes of said electric system. It is further resolved that "the consent and permission of the City of Rochester is hereby granted to said company, its successors and assigns, in addition to the rights, privileges and franchises now possessed by it," to establish, construct, maintain, operate and use during the corporate existence of said company, its successors and assigns, instead of the overhead single trolley electric system described in these resolutions, the storage battery system of electric railway propulsion on all of the lines of railroad now being operated by said company, and upon such lines as shall hereafter be lawfully constructed by said company, its successors and assigns, in said city; provided, however, the electric current used in the operation of the storage battery cars, under this grant, be not in excess of 500 volts; and provided further that the motor cars shall be constructed and maintained as to prevent the communication of the electric current from the batteries to any passenger riding thereon.

It is further resolved that the said company, its successors or assigns, shall at any time during its or their corporate existence, if required by the Common Council of said city by a two-thirds vote of all the members elected, with the approval of the Mayor, adopt and use in the operation and maintenance of its or their railroad upon all the streets upon which said railroad now is, and the extensions thereof which shall be made, improvements in electric rail-
34 way appliances and methods of operation in so far as the adoption and use of such improvements shall make the operation of its or their said street railway system more efficient and economical and less objectionable to the public than the appliances and methods then being used. It is further resolved that said company, its successors and assigns, shall, during its or their corporate existence from and after the first day of November, 1892, operate all the lines of said company as now laid out, and such extensions of said lines as shall be constructed and operated hereafter, with double end cars only, of not less length than fourteen feet; and after the first day of November, 1892, said company, its successor and assigns, shall dispense with and thereafter not use, during its or their corporate existence, upon the lines aforesaid, any bob-tail cars whatsoever.

It is further resolved that said company, its successors or assigns, shall at all times fully indemnify and protect said city of and from any and all suits, actions and proceedings that may be brought and maintained or sought to be brought and maintained by any person or corporation for or on account of or by reason of the adoption or maintenance by said company, its successors or assigns, may adopt and use, or anything connected therewith, or any act of omission or commission by said company, its successors or assigns, or any of its agents or servants, at any time or times; and shall whenever requested by said city, or any of its officers, fully defend any and every such action, suit or proceeding. Said city shall, by some of its officers or agents, in the event of any such suit, action or proceeding being brought, give notice to said company, its successors or assigns, and said company, its successors or assigns, shall be allowed to defend or assist and direct the defense of such action, suit or proceeding.

It is further resolved, that before this grant and consent
35 shall become operative, the said company shall deliver to and leave with said committee a written agreement with the city to accept and in each and everything and particular comply with each and all of the provisions contained in these resolutions and to well and truly at any and all times hereafter to indemnify and protect the City of Rochester in the particulars and manner specified in these resolutions, and to well and truly, at all times, comply with all ordinances and resolutions of the Common Council of said city not in conflict herewith, which have been at any time heretofore, or may at any time hereafter be passed relating to the rate of speed, manner of running cars, general government or use of tracks, removal of ice, snow or dirt, and the general repairs of the streets within and for two feet outside of and adjoining said company's track or tracks. Such written agreement, before being executed by said company shall be approved by the city attorney.

By Ald. FEE: Resolved, That the pending resolutions be amended as follows: Strike out the words "seriously and permanently" before the word "interfered" in the portion of the resolution relating to the consent of the Executive Board in the first paragraph of the resolutions. Adopted.

By Ald. FEE: Resolved, That the pending resolutions be amended by striking out the following in the second paragraph, to wit: "Special Committee of the Common Council of the City of Rochester on change of motive power of said railroad to electricty and to its successor," and by inserting in place thereof "proper city authorities," and by striking out the words "said committee" and inserting in place thereof "proper city authorities." Adopted.

By Ald. FEE: Resolved, That the pending resolutions be amended by adding the following:

It is further resolved that from and after the first day of
36 November, 1892, the said company, its successors and assigns shall, during its or their corporate existence, charge no passenger more than five cents for one continuous ride from any point on its road, or on any road or line or branch operated by it or under its control, to any other point thereon, or on any connecting branch thereof, within the limits of the City of Rochester.

It is further resolved that from and after November 1, 1892, the said company, its successors and assigns, shall, during its or their corporate existence, operate all of the main lines of its or their railroad with a conductor upon each car.

It is further resolved that from and after the 30th day of September, 1892, and for a period of fifteen years, said company, its successors and assigns, shall, in addition to the payments required to be made by contracts heretofore entered into between the city of Rochester and said company, pay to the City of Rochester, on the 1st day of November of each and every year during said term of fifteen years, 1 per cent. upon the entire gross receipts of said company, its successors or assigns, and that, from and after the expiration of said period of fifteen years, and during the entire corporate existence of said company, its successors and assigns, it shall pay yearly, on the first day of November, 2 per cent. upon the entire gross receipts of said company, its successors and assigns.

It is further resolved that the work of constructing its railroad, and installing the system provided for in these resolutions, shall be done under the supervision of the proper city authorities of the City of Rochester.

It is further resolved that the grant set forth in these resolutions shall not be binding on said city, unless formally accepted by said railroad company within sixty days in such manner as shall legally bind said company to perform the same on its part, and as shall be approved by the city attorney.

37 It is further resolved that the poles to be erected in the business section of the city shall be of iron.

It is further resolved that the books of said company shall be open to inspection and examination by the treasurer of the City of Rochester, or his duly appointed agent, for the purpose of ascertaining the correctness of any statement by said railroad company as to said

gross receipts; and it is further provided that if the said Rochester City & Brighton Railroad Company, its successors or assigns, fail to comply with any of the provisions of these resolutions, as to the time of construction and beginning the operation of the system permitted by these resolutions, or in respect to the payment of that portion of its gross earnings agreed to be paid to said city, or the exhibition of its books, as above provided, all grants and powers conferred by these resolutions shall cease, and the grant hereby conferred shall become void, except that if the construction of its system of works or its operation shall be stayed by injunction issued on the application of any property owner, or if it shall be delayed by reason of its inability to procure the necessary permission to make such construction or commence such operation on any street, the time of such stay or necessary delay shall not be taken into account as forming any part of the time allowed by these resolutions for such construction or beginning such operation on said street. It is also understood and agreed that nothing herein contained shall be deemed to relieve the railroad company from paying the annual license fee now required to be paid for each car placed upon said road, but the payment hereinafter provided for shall be in addition thereto.

Adopted.

By Ald. FEE: Resolved, That the resolution and grant as amended be and the same hereby are adopted.

The chair announced that all persons desiring would now be heard on the subject before the Council.

38 After hearing all persons appearing, the resolution was adopted by the following vote:

Ayes—Ald. Tracy, Sullivan, McMillan, Fee, Kohlmetz, Lempert, Williams, Shelter, Selye, Hall, Swikehard, Judson, Schroth, Bohrer, Kelly, Thayer—16.

In witness whereof, the said party of the first part has hereunto caused its corporate seal to be affixed, and these presents to be signed by its President at the place, and on the day and year first above written.

THE ROCHESTER CITY & BRIGHTON R. R. CO.

[CO. SEAL.] G. E. MUMFORD, *P't.*

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 26th day of February, 1890, before me, the subscriber, personally appeared George E. Mumford, to me personally known, and he being by me duly sworn, did depose and say: That he is the President of the Rochester City & Brighton Railroad Company; that he resides in the City of Rochester aforesaid; that he knows the corporate seal of such corporation company; that the seal affixed to the foregoing instrument is the corporate seal of said corporation company; and that said instrument was signed and sealed by him, on behalf of said corporation company, by authority of its Board of Directors; and the said Mumford, as such President, duly acknowl-

edged such instrument to be the free act and deed of said corporation company.

P. R. McPHAIL,
Notary Public.

39 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

Case and Exceptions.

This cause came on for trial at a Trial Term of the Supreme Court held in and for the County of Monroe, in December, 1903, Hon. E. A. Nash, presiding.

William A. Sutherland for the plaintiff.

Charles J. Bissell for the defendant.

A jury was waived by both parties.

The following stipulation was offered in evidence:

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

It is hereby stipulated that the following shall be the findings of fact in the above entitled action, with the exception of the
40 finding of fact No. 20, as to which the defendant may offer proof subject to objection by plaintiff.

Dated July 13th, 1903.

WM. A. SUTHERLAND,
Corporation Counsel, Attorney for Plaintiff.
SATTERLEE, BISSELL,
TAYLOR & FRENCH,
Attorneys for Defendant.

Annexed to this stipulation were the facts as found by the court herein and printed in the findings.

JOHN N. BECKLEY sworn in behalf of defendant.

Direct examination:

I reside in Rochester. At one time I was one of the officers of the Rochester City & Brighton Railroad. I was Secretary. At that time it was operated exclusively by horse power. I was actively engaged in negotiating an arrangement with the City of Rochester, that culminated in the ordinance of 1890, and the contract of the Rochester City & Brighton road, providing the terms and conditions

upon which we were to change the motive power from horse to electricity. I was familiar with the provisions of that ordinance and with the contract made by the Rochester City & Brighton Railroad. About that time there was a syndicate formed to take over the stock of the Rochester City & Brighton road. I was at that time a lawyer, practicing my profession. I examined for the syndicate the charter of the Rochester City & Brighton road. I examined the act of 1869, and the various ordinances beginning in 1862, passed from time to time, down to 1889. I examined every act and every ordinance which had been enacted respecting the Rochester City & Brighton Railroad. I disclosed to this syndicate the information I ac-
41 quired. After that they purchased the stock of the Rochester City & Brighton road. They paid for it in cash. About thirteen hundred thousand dollars, a little more than that as I remember. Some of the stock had to be purchased at a higher price than that paid for the majority of the stock. Something over thirteen hundred thousand dollars. Subsequent to that purchase the Rochester Railway Company was organized. Its first President was Mr. Yates, I think. I became President very shortly after it organized. I was Vice-President and Secretary at the time Mr. Yates was made President. The Rochester Railway purchased from the R. C. & B. its capital stock. The Rochester Railway Company took over under a lease all of the property, rights and franchises of the Rochester City & Brighton Railroad Company, the term of that lease being for perpetuity, as I remember it, and the Rochester Railway Company went into the possession under the lease. After it had gone into possession and the contract was entered into by the Rochester Railway Company and the Rochester City & Brighton Railroad Company, providing for the exchange of the stock of the Rochester City & Brighton Railroad Company for stock and bonds on the Rochester Railway Company. Under the terms of the agreement the Rochester Railway Company issued seven shares of its stock and two hundred dollars in its bonds for each one share of the capital stock of the Rochester City & Brighton Railroad Company, thereby—the result of which was to issue and deliver three million five hundred thousand dollars of the capital stock of the Rochester Railway Company, and one million dollars in bonds, for five hundred thousand dollars of the stock of the Rochester City & Brighton Railroad Company, par value. That is my recollection of the arrangement.

I don't think that those bonds that were issued have ever been sold less than par. I couldn't testify as to that. For many years
42 they have been way above par. The stock of the Rochester Railway from the time of its issue down to the present time has ranged in market value from fifteen dollars a share up to seventy-five or eighty dollars a share.

Q. At the time of the purchase of this capital stock about what was the value of the real estate of the R. C. & B., other than its tracks? A. I don't know that I can testify as to that, Mr. Bissell. I can tell you what real estate the company owned at this time, but I don't feel that I am qualified at the moment to express an opinion as to its value. It would not—I can say that the total value of the real estate, including buildings, I suppose?

Q. Including everything except the tracks? A. The total value of the real estate and buildings would not exceed, or did not exceed, at any time two hundred thousand dollars. They had a number of what were known as bob-tailed cars, one hundred seventeen, I think. They were not fit for electric cars. They had a quantity of horses. They couldn't be used on electric road. The cars brought an average price of about twenty-five dollars apiece. I don't think any of them sold for much beyond that and a good many of them sold for less. I think the horses averaged about eighty or eighty-five dollars. There were about eight or nine hundred. The rails in the streets were not proper for an electric railroad. They all had to be changed and new rails put in their place. The foundation had to be changed, and the ties. In reconstruction the ties that were suitable were of course used again—the rails were of no value to speak of. This change from horse power to electricity was gradual, and was completed entirely, I think, in 1892. In addition to the amount paid for the capital stock of the Rochester City & Brighton there was expended by the Rochester Railway in changing from horse power to electricity and in equipping the road with poles, wires,
43 rails, ties, power house, motor car up to 1892, when the change had been practically completed, about three million dollars, between two millions and a half and three million dollars. During the time that I was negotiating for the purchase of the stock of the Rochester City & Brighton and planning to convert the road into an electrical road the provisions of the different ordinances, beginning in 1862 and of the act of 1869, and the charter of the road were the subject of discussion between me and the men who furnished money, the active men in charge of the syndicate, before the purchase was completed of the stock, and before the moneys were expended in making the change. I advised the men in charge or the men who were engineering the purchase, that the act of 1869 and the various ordinances, including the contract of 1890, exempted the Rochester City & Brighton Railroad from paying for new pavements between the rails of its tracks and between its tracks, or any distance outside of its tracks, in those streets in which it obtained its franchise and constructed its road, prior to the passage of the General Railroad Act of 1884.

Cross-examination:

Three men were active in this syndicate, who were conducting these negotiations on the side of the purchasers. They are the ones to whom I gave this advice, and later on to others who were not originally active. Advice was given to Mr. McKee, Mr. Verner, Mr. Richard Clay, as well as to some of our local men, like Mr. George Mumford and others here, who are connected with the syndicate. Originally the negotiations were undertaken for the purchase of the stock of the Rochester City & Brighton Railroad Company by Mr. McKee and Mr. Verner of Pittsburg. After they had examined the physical property and had satisfied themselves with respect to, something as to its value, they came to me and I became associated with

them and at their suggestion I examined the statutes and the
44 ordinances which bore upon the question of the advisability of the purchase. Before any contracts were made for the purchase of the stock, I reported to Messrs. McKee and Verner what my opinion was, based on my examination of the acts and the ordinances. Subsequently McKee and Verner made a contract with the owners of the stock of the Rochester City & Brighton Railroad Company for its purchase and paid a certain amount of money down, the balance to be paid later if further investigations showed that the claims made were right and proper. Before anything was done in the way of closing the transaction, Mr. Cuyler of Philadelphia, with other members of the syndicate which McKee and Verner in the meantime had organized and to the whole syndicate or to such of them as ap-eared, I made the report which I have referred to, with respect to the rights of the Company under the acts of the Legislature and under the ordinances. Subsequently the contract was consummated for the purchase of the stock. That, I think, answers perhaps your question. Everything else simply followed as a result of that. I ought perhaps to add that the advice given or the opinion given, was not specifically with respect to this matter of paving, but it was as to the term of the charter and all other questions which would naturally be considered by purchasers of such a property. Another important question was as to whether there was a limitation upon the term of the extension of the company under its articles and as to the length of time that the franchise was to extend and so on, and among other questions this question of freedom from liability on the part of the company as to the expense of paving.

After the Rochester Railway Company was organized there was not that I remember any further discussion of this question before the transfer was made to the electric power, this specific question of
45 paving. I can't state whether or not this purchase would have been made if this statute of '69 and this ordinance had not been in effect and my opinion given to them? In order to state that, I should be obliged to know what the operation of the minds of the people who formed the syndicate was. It is my opinion that the purchase would not have been consummated at all and when made, if the purchase had been made, the change would not have been made from horse power to electricity, except for the belief, which I certainly had and I believe the other members of the syndicate had, that the company would have been relieved under the acts of the Legislature and under the ordinances, of the liability of payment for the expense of paving between the tracks. I think it would have been too great a burden to have assumed; I think the people would have failed to carry out the arrangements—failed to make the purchase. There was no particular discussion of this specific question as to the paving, before the purchase. The question came up in this way. The Philadelphia people were familiar with the law of Pennsylvania on the subject, and they had had experience in other parts of Pennsylvania, different cities, in connection with matters of this kind, and the question came up sharply, as to whether or not the company, in case it should be taken over and the change made,

whether the company could be called upon to pay this expense of paving, which was recognized would be a very heavy charge. That question came up specifically because of statements made as to what the Pennsylvania law was and what the practice had been in other places with respect to this matter, and I advised the members of the syndicate that under the laws and under our charter and under this ordinance, there would be no liability for the expense of paving between the tracks and two feet outside so far as the tracks had been constructed under the provisions of the law then existing.

Redirect examination:

At the time that the syndicate were negotiating for the purchase, it was contemplated at that time, that if they succeeded in
46 acquiring the entire capital stock, that a company was to be organized under the laws of '84, to take over that capital stock and construct the new road. And the Rochester Railway was thereafter organized. The plan which was subsequently carried out was all made prior to the purchase of the Rochester City & Brighton Railroad. When the Rochester Railway was organized these same men who were members of the syndicate controlled to a large extent its stock.

Recross-examination:

This opinion was given to the syndicate and not to the Rochester Railway Company.

I, Edwin A. Nash, Justice of the Supreme Court before whom the above entitled action was tried, do hereby certify that the foregoing case and exceptions contain all of the evidence given, and proceedings had, on the trial herein, and I do hereby settle the same and order it filed in the office of the Clerk of Monroe County.

E. A. NASH,
Justice of the Supreme Court.

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

In the above entitled action, tried before the Court without a jury, at the December, 1903, Monroe Trial Term, held at the Court House in the City of Rochester, the case was duly moved for trial
47 and a jury waived by the parties in open court, and the action tried by the court, and the court having heard the proofs and allegations of the parties and the admissions of fact made by the several parties upon the trial and by written stipulation filed with the court, and the court having heard the argument of counsel, makes the following findings of fact and conclusions of law:

Facts.

I.

That the plaintiff is a municipal corporation, duly incorporated as a city under and by virtue of the provisions of an Act of the Legislature of the State of New York, passed in the year 1834, being Chapter 199 of the Laws of 1834. That thereafter and prior to the year 1861, a number of acts were passed by the Legislature of the State of New York, amending Chapter 199 of the Laws of 1834, and in the year 1861, the Legislature of the State of New York passed Chapter 143 of the Laws of that year, amending and consolidating Chapter 199 of the Laws of 1834 and the several acts amendatory thereof. That thereafter the Legislature passed several acts amending Chapter 143 of the Laws of 1861, and in the year 1880, the Legislature of the State of New York passed Chapter 14 of the Laws of 1880, amending and consolidating Chapter 143 of the Laws of 1861, and the several acts amendatory thereof. That heretofore the Legislature of the State of New York passed a number of acts amending Chapter 14 of the Laws of 1880, all of which acts beginning with Chapter 199 of the Laws of 1834, are declared to be public acts. That the charter of said City of Rochester was further amended by the passage by the Legislature of the State of New York of Chapter 182 of the Laws of 1898, known as the Charter for cities of the second class, and said City of Rochester is, and at all times since the enactment of said Chapter 182 of the Laws of 1898 was, a city of
48 the s-*ocn*d class in the State of New York, and subject to the provisions thereof, and since the passage of Chapter 182 of the Laws of 1898, the Legislature of the State of New York have passed several acts amendatory thereof, all of which acts are public acts.

The Rochester City & Brighton Railroad Company was a street surface railroad corporation, duly incorporated on or about the 31st day of May, 1862, under and pursuant to the provisions of an Act of the Legislature of the State of New York, entitled "An Act to authorize the Formation of Railroad Corporations and to regulate the same, passed April second, 1850, and the several Acts amendatory thereof." Said Act of 1850 being known and designated as Chapter 140 of the Laws of the State of New York of that year. Said corporation was incorporated for the purpose of constructing, maintaining and operating a street surface railroad from a point in the Town of Brighton, Monroe County, through various streets in the City of Rochester, named in its Articles of Association as set forth in the second finding herein, into the Town of Greece, Monroe County, New York.

That between the 27th day of February, 1869, the date of the passage of Chapter 34 of the Laws of 1869 hereinafter referred to, and the 7th day of May, 1884, a number of streets in which the Rochester City & Brighton Railroad Company had constructed and was operating and maintaining its street railroad in the City of Rochester, were improved by a new pavement under the provisions of

the existing charter of the City of Rochester and the entire expense of such improvement assessed upon the property owners owning property abutting upon such street. That between the 6th day of May, 1884, and the 1st day of May, 1891, the date that the General Railroad Law of the State of New York took effect, many streets in the City of Rochester in which the Rochester City & Brighton
49 Railroad Company had constructed and was operating and maintaining a street railway, were improved by the making of a new pavement under the then existing charter of the City of Rochester, and the entire expense thereof assessed upon the abutting property owners upon such street. That between the 1st day of May, 1891, and the 16th day of March, 1897, many streets in the City of Rochester in which the Rochester City & Brighton Railway Company, prior to the 6th day of May, 1884, and after that date and prior to the 1st day of May, 1891, and in which the defendant, after the date of the lease hereinafter referred to by the Rochester City & Brighton Railroad Company to the defendant, had constructed, operated and maintained a street railway, were, under the charter of the City of Rochester as it then existed, improved by the making of a new pavement and the entire expense of such pavement was, under such existing charter, assessed against the property owners whose property abutted upon such several streets.

II.

That on the 24th day of June, 1862, pursuant to the provisions of the said Act of 1850, the Common Council of the City of Rochester, a municipal corporation created by and under the laws of the State of New York, granted by resolution and ordinance, to the said Rochester City & Brighton Railroad Company, its consent to the maintenance, construction and operation of its railroad in and through the streets and avenues of the City of Rochester, designated in its articles of association. And in and by such ordinance, it was among other things provided as follows:

"Resolved, that the Common Council of the City of Rochester will permit to be constructed in said City, by the Rochester City & Brighton Company, a corporation organized under and by the authority of the General Railroad act passed April 2nd, 1850, and the several acts amending the same, a railroad which shall commence
50 in the Town of Brighton, Monroe County, to run along the Brighton Road to East Avenue in said City, along East Avenue, Main and Buffalo Streets and West Avenue to the Town of Gates; also from East Avenue along and through Prince Street to University Avenue and through University Avenue to Main Street; also from University Avenue along Main Street to East Avenue; also from the Town of Brighton through Mt. Hope Avenue to and through Clarissa Street to Greig Street; also through Greig Street to and through Plymouth Avenue to Buffalo Street; also from Clarissa Street to and through Exchange Street to Buffalo Street; also from Buffalo Street through State Street and Lake Avenue, so-called, into the Town of Greece; also from the junction of Clarissa Street and Mt. Hope Avenue, through said Avenue and through South and

North St. Paul Streets to the Town of Irondequoit; also from Main Street through Clinton Street to Monroe Avenue and through Monroe Avenue to and through Alexander Street to East Avenue; also from Main Street through North Clinton Street to the Town of Irondequoit, to be constructed, established, maintained and operated upon the terms, conditions and stipulations hereinafter prescribed."

"SECTION 2. The track of the said railroad shall be so laid as to permit the passage of vehicles and carriages over the same, and the rails shall be laid even with the surfaces of the streets and shall conform to the grades thereof as now established, or as they shall from time to time be established or altered. Said Company shall, under the terms of and as required by the Common Council of the City of Rochester, improve with suitable material as such Common Council shall direct, and in a proper manner, between its tracks, the rails of its tracks, and for two feet and four inches outside thereof and shall keep the surface of the street inside the rails and for two feet and four inches outside thereof in good repair, and all dirt
51 and filth removed therefrom as may be directed and required by the said Common Council."

"SECTION 6. The Said Railroad Company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age accompanied by parents or other persons having them in charge, such children to ride free."

"SECTION 17. It is hereby reserved to the Common Council of the City of Rochester the right to make such further orders, rules and regulations, in relation to the construction, repairs and operation of said railroad as from time to time may be deemed necessary to protect the interests of said city and the safety, welfare or accommodation of the public. But no alteration of these rules shall be made which shall have the effect to impair the substantial rights of said Company.

SECTION 19. In case said Company shall fail to keep said streets and avenues in which their said railroad shall be laid in repair, as herein provided, and shall neglect to make such repairs for two days, after notice in writing from the street commissioners or other officers having supervision of repairs of streets or avenues, served upon the superintendent or other managing officers of said railroad, specifying the repairs, the said Common Council shall have the right to cause such repairs to be made, and to assess the expense thereof upon the property of said Company, or sue for and collect the same of said Company.

And in case said Company shall fail to comply with any of the rules and regulations of the Common Council herein contained or provided for, the said Company shall pay to the city a penalty of twenty-five dollars for each and every violation, and if the said Company shall refuse or neglect to comply with any of such rules and regulations, after notice served in writing on the superintendent or other managing officer of said railroad requiring com-
52 pliance, the said company shall pay to the city an additional penalty of twenty-five dollars for each and every day during which such violation is continued.

Provided, however, that an action for such penalty or penalties shall be brought within two months from the time of such violation."

Such ordinance contained various other provisions providing for the kind of track and manner in which the cars should be run; providing for a license fee of five dollars for each car used upon such railway and providing that the grant should be formally accepted by the Railroad Company within sixty days from the date of the passage of the resolution, in such manner as should be approved by the City Attorney of said City.

III.

That thereafter and on the 8th day of July, 1862, said Rochester City & Brighton Railroad Company duly accepted the grant, subject to the provisions and restrictions therein contained, and such acceptance was duly approved by the City Attorney of the City of Rochester.

IV.

That on or about the 16th day of October, 1862, said Rochester City & Brighton Railroad Company duly executed and delivered to Hobart F. Atkinson, as trustee, a mortgage on all its property, rights, privileges and franchises to secure an issue of bonds of the face value of one hundred thousand dollars, which mortgage was duly recorded in the office of the Clerk of the County of Monroe in the State of New York, in Liber 108 of Mortgages at page 217.

V.

That after the acceptance of said franchise from the City of Rochester, and before default in the fulfillment of the condi-
53 tions of said mortgage, as hereinafter stated, the Rochester City & Brighton Railroad Company proceeded to and did construct its said railroad in a number of the streets named in the said resolution of the Common Council, and in its Articles of Association, and in so doing expended a large amount of money, but the exact amount of which does not appear; and thereafter it operated its cars thereon, and duly complied with all the provisions of said ordinance.

VI.

That after the making of the mortgage hereinbefore referred to, default having occurred in the fulfilment of its conditions on the part of said mortgagor, an action was duly commenced by said Hobart F. Atkinson, as trustee, in the Supreme Court of the State of New York, for the foreclosure of said mortgage and that such proceedings were thereafter duly had in said action as that a decree of foreclosure of said mortgage and for the sale of the mortgaged property, franchises, rights and privileges of the said Rochester City & Brighton Railroad Company, was duly made and entered in said Supreme Court and on or about the 28th day of February, 1868, under and pursuant to said decree said property, rights, privileges, franchises and interests of said Rochester City & Brighton Railroad Company

were duly sold and the same was duly purchased by Chauncey B. Woodworth, to whom the same was duly conveyed by the officer making such sale, which conveyance was duly recorded in the office of the Clerk of the County of Monroe.

VII.

That on or about the 5th day of March, 1868, the said Chauncey B. Woodworth, purchaser at said foreclosure sale, pursuant to the statutes of the State of New York in such case made and provided, duly associated with himself as such purchaser at such foreclosure sale, certain individuals, and duly filed in the office of the
54 Secretary of State articles of association reciting, among other things, as follows: "Now, therefore, the persons whose names are subscribed hereto, hereby associate themselves together and form a company by the name of the Rochester City and Brighton Railroad Company, for the purpose of making and operating a railroad in the City of Rochester, heretofore constructed, maintained and operated by the said Rochester City & Brighton Railroad Company, a corporation organized as aforesaid, on the 31st day of May, 1862, in and through the streets wherein said railroad is now laid and run, and in and through such other streets as the public interests may hereafter require, and such other tracks, side-tracks, switches and turnouts as such public interests may from time to time demand. The said company is to continue ninety-nine years."

Said articles of association were duly subscribed by the said Chauncey B. Woodworth and the persons associated with him and contained the statements required by the statutes of the State of New York, in such case made and provided.

VIII.

That immediately after the incorporation of the Rochester City & Brighton Railroad Company, by the said purchaser on said foreclosure sale, and his associates, the said railroad company duly petitioned the Common Council of the City of Rochester protesting against the onerous conditions of Section 2 of the said resolution of 1862, granting the consent of the Common Council and setting forth the inability of the new corporation to proceed with the operation of the railroad, subject to such conditions, and the fact that the railroad had never paid owing to the existence of such conditions. That thereafter and for a space of upwards of a year, the question was debated in the Common Council, committees appointed and various hearings had and proofs offered by the company as to the expense of
55 building, maintaining and operating the road, and finally, on the 12th day of January, 1869, the Common Council of the City of Rochester duly amended Section 2 of the ordinance of 1862, so as to read as follows: "The track of said railroad shall be laid so as to permit the free passage of vehicles and carriages over the same and the rails shall be laid even with the surface of the streets and shall conform to the grades thereof as now established, or as they shall from time to time be established or altered. Said Company

shall, as soon after the adoption of this ordinance as the condition of the streets through which their track is laid will permit, put the surface of said streets inside the rails and for one foot outside thereof, in good and thorough repair under the direction of the Committee on Streets and Bridges, of the Common Council, and shall thereafter keep said streets in good repair inside its tracks or between the rails of their track, only during the term of five years, and whenever it becomes necessary to improve by ordinance or otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said Company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same, during the term of five years from the adoption of this ordinance."

And on the same date, the Common Council amended Section 6 of said ordinance of 1862, so as to read as follows:

"Said Company may charge and collect from every person on entering any of their cars or carriages, for riding any distance upon said road, to or from the extremities at either railway depot, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge. Such children to ride free and except also that said Company shall not charge nor receive from children under twelve years of age, more than three cents for any of above distances."

56 IX.

That very shortly after the adoption of the resolutions referred to and set out in number 8 above, an Act was drawn by the Rochester City & Brighton Railroad Company, a copy of which act was transmitted to the Common Council of the City of Rochester by the Mayor of said city, with a written request that said Common Council by resolution approve and direct the clerk to transmit the bill to the members of the Senate and Assembly, with the request that they procure its passage. That thereafter the Common Council of the City of Rochester duly passed the following resolution:

"Resolved, That the clerk of this Board be authorized to transmit a copy of the bill relating to street railroads presented by the mayor to this Board, to the Legislature requesting that body to legalize the action of the Common Council by the passage of said bill."

That on or about the 12th day of February, 1869, said act was passed by the Legislature of the State of New York, and duly signed by the Governor of said State and is entitled, "An Act for the relief of the Rochester City & Brighton Railroad Company" and is known and designated as Chapter 34 of the Laws of the State of New York, for the year 1869.

That a true copy of said Act is annexed to the defendant's answer herein, marked "A," to which reference is hereby made.

X.

That thereafter the said Rochester City & Brighton Railroad Company continued to maintain and operate its street surface railroad under the general statutes of the State of New York and with the

consent of the Common Council (to) extended its railroad into many other streets and parts of streets in (said) the City of Rochester, incurring thereby large expenses and expending large sums of
57 money therefor, the exact amount of which does not appear.

That it kept in repair the pavement between its tracks, the rails of its tracks and for one foot outside thereof, but whenever a street was improved by a new pavement it was never called upon by the authorities of the City of Rochester to make or pay for any part of such improvement. That on the 18th day of May, 1880, the Common Council of the City of Rochester reenacted the ordinance of 1862, as amended in 1869.

XI.

That on the 29th day of March, 1887, the Common Council of the City of Rochester passed an ordinance in relation to street railroads, which ordinance so passed was as follows:

"SECTION 1. Every street surface railroad within the City of Rochester shall consist of a single track to be laid in the center of the streets or avenues through which the same is or may be designed to run, unless the Common Council shall otherwise direct in respect to some of the wide streets or avenues, with necessary turn outs, side tracks and switches, and to be constructed with the improved broad rail, of the most approved kind and weight, five inches face, not to exceed three-quarters inch raised edge, to be laid flush with the surface of the street or avenue, and four feet and ten inches apart between the raised edges, so as to accom-odate the most common width of carriage wheels, and to be laid on suitable timbers, with suitable crossties, unless otherwise permitted or directed by the Common Council, under the direction of the Executive Board."

"SECTION 2. The track of said railroad shall be so laid as to permit the free passage of vehicles and carriages over the same, and the rails shall be laid even with the surface of the streets and avenues,
58 and shall conform to the grades thereof, as now established, or as they shall from time to time be established or altered. As soon after the adoption of this ordinance as the condition of the streets and avenues, through or along which any street surface railroad track is now laid will permit, the surface of such streets and avenues inside the rails of all tracks authorized to be laid prior to May 6th, 1884, and between the tracks and rails of such tracks and for a space two feet in width outside and adjoining the outside rails of the tracks of any and all extensions or branches of any railroad authorized to be constructed since May 6th, 1884, shall be put in good and thorough repair by the company, under the direction of the Executive Board of said city, and thereafter at all times the same shall be in like manner and degree kept and maintained; as to tracks authorized to be constructed or laid prior to the 6th day of May, 1884, the surface of said streets and avenues inside and between the rails thereof; and roads and any and all extensions and branches of any roads authorized to be constructed or laid since May 6th, 1884, between the tracks and the rails of the tracks, and a space two feet in width outside and adjoining the outside rails of the track or tracks."

"SECTION 3. During the operation of laying rails a free passage

for carriages and other vehicles over and along the streets and avenues in which such track laying be done, shall be kept open, and immediately after the rails shall be laid, the pavement, flagging and other materials necessarily removed in laying the same shall be replaced in a good and substantial manner and the street or avenue be placed or put in as good condition as before such removal or track laying, and the surface of the pavement made flush with the rails, and no portion of the pavement or surface of the streets or avenues shall be kept broken or distrurbed for a greater time than five days. And all surplus street material shall be carefully removed by said company laying such track."

59 "SECTION 4. The cars to be used on any such railroad shall be drawn by horses or mules only, at a speed not exceeding the rate of seven miles per hour, and shall run as often as once in every fifteen minutes between the hours of 6 o'clock in the morning and 12 o'clock midnight, upon all routes now or hereafter constructed, except the Lake Avenue route from Driving Park Avenue to the Ridge Road, and the lines hereafter constructed in the Fifteenth or Sixteenth wards, and upon those lines as often as once in every half hour, of each and every day hereafter; and the cars upon each and all the routes shall commence running and shall run and start from the Four Corners, so-called, or the junction of West Main, State and Exchange streets in the manner and at the times aforesaid. The company or companies while they comply with the requisitions in respect to the running of their cars above referred to, may run their cars as much oftener as they shall choose either on the whole length or over a portion or portions of their said road."

"SECTION 5. There shall be posted in each car, in a conspicuous place therein, a plainly printed copy of the rates of fare or charges allowed by law to be charged or received for the transportation of passengers by the company running or operating such car; and there shall also be posted in a conspicuous place in each car a plainly printed or painted sign containing the number of the car and the name of the route or routes on which the car is then run and so as to be easily read by any person on entering the car."

"SECTION 6. No car shall be allowed to stop on a crosswalk nor in front of an intersecting street, except as shall be necessary to avoid collisions, or to prevent danger to persons in the street."

"SECTION 7. When the conductor of any car is required to stop at the crossing of any two streets to receive or land passengers, the car shall, if convenient, be stopped so as to leave the plat-

60 form slightly over the crossing."

"SECTION 8. It shall be the duty of the company, or Companies, to employ careful, sober and prudent agents, conductors and drivers, to take charge of their cars while on the road, and it shall be the duty of such agents, conductors and drivers, so far as the same is practicable, to keep a vigilant watch for all teams, carriages and persons on foot, and especially children, and at the first appearance of danger to such teams, carriages, footmen, children or other obstructions, the car or cars shall be stopped in the shortest time and space practicable. The company or companies

may, in their discretion, run cars without any other conductor than the driver."

"SECTION 9. The conductors shall not allow women or children to enter or leave the cars while in motion."

"SECTION 10. Conductors shall announce the names of the principal streets and avenues as the car reaches them."

"SECTION 11. Whenever it shall be necessary to remove any snow or ice from the track or tracks from said road or roads, the same shall be done by the company owning and operating such road in such manner, and so carefully and evenly spread on the street or avenue, as not to obstruct the free passage of sleighs or vehicles upon or along said street or avenue, or in crossing the same, or by foot passengers at crossings, and no salt or brine shall be used for the purpose of removing snow or ice from said track or tracks, or the rail or rails thereof, except at curves, switches or turntables, and there only and barely sufficient for the purpose of removing snow or ice from, and to be carefully and only placed upon such rail or rails. Any company or corporation or person, violating any of the provisions of this section shall be subject and liable to pay a fine or penalty of twenty-five dollars for each offense."

"SECTION 12. It is hereby reserved to the Common Council of the City of Rochester the right to make such further orders, rules and regulations, in relation to the construction, repairs and operations of any street surface railroad now, or hereafter to be, constructed, maintained and operated, as from time to time may be deemed necessary by said Common Council to protect the interests of said city, and the safety, welfare or accommodation of the public. But no alteration of these rules shall be made which shall have the effect to impair the substantial rights of such company or companies."

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"SECTION 13. Wherever gas or water pipes, or sewers, are now laid in any street or avenue, said railroad or railroads must be laid down and maintained subject to the rights over the same now in the city, and the gas and water companies, and the Executive Board of said city to take up, alter, repair or remove said pipes or sewer in such manner as not unreasonably to damage or injure said railroad or railroads, or its or their use, without claim upon or to said city, gas or water companies, or said Executive Board, or its successor, and the Common Council expressly reserves to itself the right hereafter to lay down, or cause or permit to be laid down, in said streets or avenues, gas or water pipes, or sewers, and to alter, improve and repair said streets or avenues, whenever the public or private good or convenience may require.

"Gas or water companies, or private individuals, who shall take up the pavement, or excavate the street for the purpose aforesaid, being always required, as by the present city ordinances, to restore the street to its former condition."

"SECTION 14. In case any street surface railroad company now or hereafter incorporated and operating and maintaining any road within the City of Rochester shall fail to keep the streets and avenues

in which their said railroad shall be laid in repair, as herein provided, and shall neglect to make such repairs for five days,
62 after notice in writing, from the Executive Board of said city, or other officer or officers having the supervision of repairs of streets or avenues within said city, served upon the superintendent or other officer of said railroad, specifying the repairs, the said Common Council and said Executive Board, or either of them, shall have the right to cause such repairs to be made, and the expenses thereof may be assessed upon the property of said company or sued for and collected in the name of and on behalf of the City of Rochester from said company so neglecting as aforesaid."

"SECTION 15. And in case any company, and each and every of its agents, servants, conductors and drivers who shall fail to comply with, or shall violate any of the provisions of any of the sections of this ordinance, it and them or him shall forfeit and pay a fine or penalty of not less than ten dollars and not more than one hundred dollars, for each and every such violation; and if the said company shall refuse or neglect to comply with any of the rules and regulations hereinbefore made or imposed upon it, after notice served in writing on the superintendent or other officer of said company, requiring compliance as herein provided, the said company shall forfeit and pay a further and additional fine or penalty than one hundred dollars, for each and every day during which such violation is continued."

"SECTION 16. Should any company fail to complete its railroad, or to commence running its cars thereon within one year after the construction thereof is begun, or should any company neglect to run cars on its road after the completion thereof, for the accommodation of the public, as provided by the rules and regulations of this ordinance, for the space of two consecutive months, then such company shall forfeit all privileges and rights which they may have acquired heretofore or hereafter by any grant, or use or possession of any of the streets or avenues within said city, upon which such cars are not so run; and in such case the City of Rochester reserves
63 the right, by its Common Council, to cause all obstructions and materials placed in said streets or avenues by said company to be removed therefrom, and said streets and avenues put in as good condition and repair as they were before said materials and obstructions were placed therein, and the expense thereof shall be paid to said city by such railroad company; and said city, also, in such cases reserves the right to grant the same rights and privileges to any other person or persons, corporation or corporations, in the manner now, or hereafter, prescribed by law, free from all charge or liabilities for damage on account thereof."

"SECTION 17. If by reason of any act, omission or neglect of any railroad company, its officers or agents, the corporation of the City of Rochester, shall, or may be subjected to any damages or liability, the said company shall be liable to the said city to the same extent."

"SECTION 18. Each and every street surface railroad company or corporation now or hereafter incorporated and operating and maintaining any road within the City of Rochester shall, and it

hereby is required to pay to the treasurer of the City of Rochester, for the use of the city, five dollars per annum for each car or carriage owned or operated by them, and every such company shall obtain from the mayor of the city a license for each of said cars or carriages, which it shall be his duty to grant without fee or reward, on the production of the treasurer's receipt for such payment; and provided, further, that such license shall, in every case, expire on the thirty-first day of March in each year, and that any company or corporation now operating and maintaining any road within said city shall pay such fee and obtain such license within thirty days from the date of the passage of this ordinance, and the same to begin on April 1, 1887. The president or managing officer and secretary of such, and every such company or companies shall, on or before the first Monday in April of each year, commencing the first Monday of April, 1887, furnish to the Common Council of said city, a full and complete list of all the cars or carriages owned and operated by the company, and such statement shall be verified by the oath of the said president or managing officer and secretary, to be administered by a notary public of Monroe County, and attested by his seal, and the city clerk shall notify every such company or corporation of such requirement, and every such corporation or company, or the president or managing officer or secretary thereof, who shall fail to pay such fee and obtain said license, or who shall fail to make such report and list at the time and in the manner above specified, shall be liable to pay a fine or penalty of not less than ten dollars, nor more than fifty dollars, and a further penalty of the same amount for each and every twenty-four hours such neglect shall continue."

64

"SECTION 19. Whenever any company shall, for any reason, remove from their tracks, or any portion of the adjacent roadways, at any street corner, or street intersection, except by means of a plough, scraper, or otherwise, as is authorized or permitted to be done by section eleven of this ordinance, or shall remove, in any manner, from their tracks, or any portion of the adjacent roadway, at what is commonly known as the "Four Corners," or the intersection of West Main Street with State and Exchange Streets, and of East Main Street with North and South St. Paul Streets, any dirt, dust, filth, snow or ice, the same shall be removed from such street or avenue entirely by said company, without delay; and if the same is deposited, and not immediately removed, as aforesaid, it shall be immediately removed by the Executive Board of the city, and the cost and expense of such removal shall be paid by the company so offending, and, in addition thereto, for the violation of this section, such offending company shall be liable to a fine or penalty of fifty dollars for each offense, and a further penalty of fifty dollars for every twenty-four hours such violation shall continue."

65

"SECTION 20. Whenever any company shall for any reason remove from their tracks, or any portion of the adjacent roadways at any street corner or street intersections, including what is commonly known as the "Four Corners," and the intersection of

St. Paul streets with East Main street, any dust, dirt, filth, snow or ice, the same shall be taken away from the street entirely by said company without delay, and shall not be deposited upon the sides of any other portion of the street surface, and if the same is deposited contrary to the provisions hereof, the same may be immediately removed by the Executive Board of the city and the cost and expense thereof shall be paid by the company so offending, and in addition thereto for the violation hereof, such offending company shall be liable to a fine or penalty of fifty dollars for each offense, and a further penalty of fifty dollars for every twenty-four hours such violation shall continue."

"SECTION 21. The penalties prescribed for the violation of any section of this ordinance shall not in the aggregate exceed the sum of one hundred and fifty dollars for any specific violation thereof, anything hereinbefore to the contrary notwithstanding."

"SECTION 22. Every execution issued upon a judgment recovered for a violation of this ordinance, or any provision thereof, except as hereinbefore otherwise specially provided, shall command the amount to be made of the property of the defendant, if any such can be found, and, if not then to commit the defendant to the Monroe County penitentiary; and any person violating any provision of this ordinance and failing to pay the penalty, or fine imposed therefor, shall be imprisoned in said penitentiary for a term of not exceeding one hundred days."

"SECTION 23. This ordinance shall take effect immediately."

66 XII.

That on or about the 21st day of January, 1890, the Rochester City & Brighton Railroad Company duly petitioned the Common Council of the City of Rochester for permission to change its motive power from horse to the overhead system of electricity, commonly known as the "trolley system."

That the prayer of said petition was duly granted by the municipal authorities of said City of Rochester and on or about the eighteenth day of February, 1890, the Common Council of the said City of Rochester duly adopted the resolutions which are set forth in full in the contract which is annexed to the answer and marked "B," which said contract and the resolutions therein set forth are true copies of the resolutions so passed, and of the contract accepting such resolutions, hereinafter referred to, and are hereby referred to and made a part hereof.

That within the time prescribed by such resolutions, the Board of Directors of the Rochester City & Brighton Railroad Company duly adopted a resolution accepting in all things the grant contained in said resolutions of the Common Council and agreeing to abide by the same and a certified copy of said resolutions of said Board of Directors was delivered to the City Attorney of the City of Rochester, and duly approved by him and filed in the office of the Clerk of the City of Rochester. That on the 25th day of February, 1890, the Rochester City & Brighton Railroad Company duly executed the contract containing a copy of said resolutions of the Common Council,

which contract is annexed to the answer herein marked "B" and hereby referred to as a part hereof and the City Attorney of the City of Rochester duly approved said contract and the same was duly filed in the office of the Clerk of the City of Rochester.

67 XIII.

That on or about the 17th day of September, 1872, permission was granted to the Rochester City & Brighton Railroad Company by the Common Council of the City of Rochester, to lay its tracks in North St. Paul Street, from Main Street to Ward Street; said Ward Street being beyond the New York Central crossing, provided the said railroad company should pave two feet each side of the track with Medina stone pavement, from East Main Street to the center of Ward Street. That on the 17th day of May, 1881, permission was duly granted by the Common Council of the City of Rochester to the Rochester City & Brighton Railroad Company, to lay its tracks in Park Avenue, from Alexander Street to a point beyond Meigs Street. That both North St. Paul Street and Park Avenue, at the time such permission was granted to the Rochester City & Brighton Railroad Company, were and each was, and each of them ever since has been, a public street in the City of Rochester. That prior to the 6th day of May, 1884, the said Rochester City & Brighton Railroad Company constructed its said road in such parts of said streets and was engaged in operating the same on said day.

XIV.

That after the passage of said resolutions and the making of said contract containing said resolutions, a copy of which is annexed to the answer and marked "B" and is referred to in the twelfth finding herein, the said Rochester City & Brighton Railroad Company performed the terms and obligations of said resolutions in manner and form as in said resolutions provided, but it never, constructed or paid for any portion of any new pavement in any street or streets, through which it maintained and operated its railroad, and the question as to whether it was bound to do so, under said ordinance and contract, is to be determined in this action as a question of law.

68 XV.

That the defendant in this action is a domestic street surface railroad corporation duly incorporated under an Act of the Legislature of the State of New York, entitled "An Act to provide for the construction, extension, maintenance and operation of Street Surface Railroads and Branches thereof in such Towns and Villages," passed May 6th, 1884, said Act being known as Chapter 252 of the Laws of the State of New York for that year with a capital stock of 5,000 shares of the par value of $100 each. That under and pursuant to the provisions of said Act, it filed its articles of association in the office of the Secretary of State of New York, on the 25th day of February, 1890, and that the route designated in its articles of association comprises, with other routes, the route designated

in the articles of association of the Rochester City & Brighton Railroad Company, and all of the streets into which said Rochester City & Brighton Railroad Company extended its lines, and included both of the streets mentioned and referred to in the complaint in this action.

That on the 6th day of September, 1889, a franchise and permission was duly granted by the local authorities of the City of Rochester to the Crosstown Railroad Company of Rochester, N. Y., a corporation organized and incorporated on the first day of April, 1889, under and pursuant to Chapter 252 of the Laws of 1884, to construct, maintain, and operate by electric power, lines, branches and extensions of its street surface railroad in, upon, through and along the following streets, avenues and highways in the City of Rochester, commencing on Scio Street at its intersection with German Street; thence along German Street eastwardly to Alexander Street; thence across Alexander Street to the westerly end of Central Park; thence along Central Park through the parkway between the two roadways to Goodman Street, which franchise and permission was granted "upon the express condition that
69 the provisions of Chapter 252 of the Laws of 1884 of the State of New York pertaining to this consent be complied with," and "upon the express conditions, restrictions, limitations and provisions set forth in Chapter 252 of the Laws of 1884." That thereafter and on the 10th day of March, 1890, the said Cross Town Railroad Company of Rochester, N. Y., entered into an agreement with the Rochester Railway Company, the defendant herein, whereby and wherein the said Cross Town Railroad Company granted, demised and leased to said defendant, its railroad, cars, rights of way, real estate, rights, privileges, franchises and property of every description, and by said Cross Town Railroad Company, and for and during the entire corporate existence of said Cross Town Railroad Company. That on the 24th day of September, 1899, a franchise and permission was duly granted by the local authorities of the City of Rochester to the South Park Railroad Company of Rochester, N. Y., a corporation duly organized and incorporated on the first day of April, 1889, under and pursuant to Chapter 252 of the laws of 1884, to construct, maintain, operate by electric power and use, lines, branches and extensions of a street surface railroad, in, upon, through and along the streets, avenues and highways hereinafter named, commencing at the intersection of the center line of Church Street with the center line of North Fitzhugh Street; thence along Church Street westerly to the center line of Sophia Street; thence along Sophia Street to the northerly line of West Main Street; thence across West Main Street and along Plymouth Avenue to the center line of Spring Street; thence along Spring Street to the center line of South Fitzhugh Street; and also commencing at Pinnacle Avenue, at the intersection of said avenue with Meigs Street; thence southerly along Pinnacle Avenue to the city line of the City of Rochester, together with the necessary turnouts, branches, switches, turntables and crossovers, and single and double curves,

for the convenient operation of said railroad, which franchises
70 and permission was granted "upon the express condition that the provisions of Chapter 252 of the Laws of 1884 of the State of New York, pertaining to this consent be complied with;" and "upon the express conditions, restrictions, limitations and provisions set forth in Chapter 252 of the Laws of 1884."

That thereafter and on the 10th day of March, 1890, the said South Park Railroad Company of Rochester, N. Y., entered into an agreement with the Rochester Railway Company, the defendant herein, wherein the said South Park Railroad Company granted, demised and leased to the defendant, the railroad, cars, rights of way, real estate, rights, privileges, franchises and property of every description belonging to said South Park Railroad Company, and for and during the entire term of the corporate existence of the South Park Railroad Company. That the defendant duly accepted said leases and thereupon entered into possession of the demised railroads and property.

XVI.

That on or about the 25th day of February, 1890, the Rochester City & Brighton Railroad Company, last above mentioned, duly executed and delivered to the defendant, a lease, under the corporate seal of said Company, of all its property, franchises, rights and privileges, of every kind and description, for the unexpired term of its charter, pursuant to the provisions of the statutes of the State of New York in such case made and provided. Such lease was duly executed under the corporate seal of both companies and duly submitted to the stockholders of each of said companies at a meeting thereof called separately for the purpose of taking the same into consideration, and notice as required by statute of the time and place of holding said meeting and the object thereof, was duly given to the stockholders of each of said companies by a written or printed notice in the manner and form as by the statutes provided. That
71 at said meetings of said stockholders, duly held, the said lease was duly submitted, ratified and approved by the votes of more than two-thirds of the stockholders of each company that proportion being present at each meeting in person or by proxy. That the defendant duly accepted said lease and thereupon entered into the possession of the demised railroad and property.

XVII.

That thereafter and in the year 1890, the defendant, being the lessee of the Rochester City & Brighton Railroad Company, duly acquired, pursuant to the statutes of the State of New York in such case made and provided, the entire capital stock of the Rochester City & Brighton Railroad Company, which said capital stock was duly surrendered and transferred to the defendant and a certificate of such surrender and transfer was duly filed in the office of the Secretary of State of New York, under the common seal of the defendant, to whom such surrender or transfer had been made.

XVIII.

That thereafter in the year 1890, the defendant applied to the Board of Railroad Commissioners of the State of New York for permission to change the motive power of the railroad so acquired by it, and of such extensions thereof, as were contemplated and as were embraced in its articles of association and in said Act of 1869, from horse power to electricity. That such proceedings were thereupon had, that in said year the Board of Railroad Commissioners of the State of New York, duly granted such permission to this defendant, and the property owners in the several streets in which such change was to be made, duly gave their consent to such change.

XIX.

That immediately thereafter, beginning in the year 1890, the defendant, at great expense, proceeded to and did reconstruct
72 the entire railroad which it had acquired from the Rochester City & Brighton Railroad Company, and equipped the same with electrical appliances. That in making such change of motive power to electricity, as aforesaid, it became and was necessary for the defendant to, and the defendant did, reconstruct in its entirety, the road so acquired by it, as aforesaid, including the replacing of the ties, rails and foundation with new material and in replacing all of the cars with new motor power. That previous thereto the cars of said company running on said railroad were operated by horse power.

XX.

That the defendant in acquiring the capital stock of the Rochester City & Brighton Railroad Company and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the reconstruction and re-equipment thereof, had, prior to the commencement of this action, expended upwards of four millions of dollars, and that such expenditure was made by the defendant in reliance upon the provisions of said Act of 1869, and in reliance upon said contract, marked "B," annexed to the answer, with the said City of Rochester, and the resolutions therein embraced.

XXI.

That since the making of the said contract of February 25th, 1890, and up to the time of the lease to the defendant, the said Rochester City & Brighton Railroad Company duly complied with and performed all the conditions of said contract by it to be performed, and that since the making of said lease this defendant has duly complied with and performed all the conditions and obligations of said concontract, on its part to be performed, but it never, prior to March 16th, 1897, constructed or paid for any portions of a new pavement
in any street, or streets, through which it maintained and
73 operated its railroad, and the question as to whether it was bound so to do under existing laws, ordinances and contracts, is to be determined as a question of law herein.

XXII.

That after the passage of the Act of 1869 and up to the time of the making of said lease to the defendant, the Rochester City & Brighton Railroad Company kept in repair that portion of the pavement in the streets in which its tracks were laid prior to May 6th, 1884, and in those streets in which it extended its tracks after the 6th day of May, 1884, it kept the same space in repair, and, after the ordinance of 1887, in addition, that portion of the pavement for two feet outside the rails of its tracks. That since the making of said lease to the defendant it has kept in repair the portion of the street in which the tracks of the Rochester City & Brighton Railroad Company were laid prior to May 6th, 1884, and in those streets in which the Rochester City & Brighton Railroad Company, or the defendant, extended its railroad after the 6th day of May, 1884, has kept in repair that portion of the streets and also for two feet outside of its tracks.

XXIII.

That since the passage of the Act of 1869 and up to March 16th, 1897, neither Rochester City & Brighton Railroad Company or the defendant, has ever been assessed for or required to pay any portion of the expense of a new or permanent improvement of any portion of any street, avenue or highway in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed its road prior to the 6th day of May, 1884.

XXIV.

That since the passage of Chapter 252 of the Laws of 1884, on the 6th day of May, 1884, the Rochester City & Brighton Railroad Company obtained from the municipal authorities of the
74 City of Rochester various consents to extend its tracks and railroad into various streets of the City of Rochester, and the municipal authorities of the City of Rochester have from time to time granted such consents upon the condition provided for in Chapter 252 of the Laws of 1884, as follows: "Upon the express condition that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with," and since the lease to the defendant of the property and franchises of the Rochester City & Brighton Railroad Company, and the filing of the certificate of the acquisition of all of its capital stock, the defendant has applied to the municipal authorities of the City of Rochester for consent to extend its railroad into various streets in the City of Rochester, named in its articles of association or in certificates of extension filed by it, and the municipal authorities have granted such right or franchise to make such extension since the passage of the General Railroad Act, known as the Railroad Law, and such consents have had annexed the condition required by the provisions of the General Railroad Act, as follows: "That the foregoing consent is given upon the following conditions expressly, to wit: that the provisions of Article IV. of the Railroad Law pertinent thereto

shall be complied with. That this consent shall be filed in the office of the clerk of the County of Monroe." And both the Rochester City & Brighton Railroad Company and the defendant acted upon such consents and made and built the extensions into such various streets under such consents.

XXV.

That on the 11th day of December, 1894, the defendant presented to the Common Council of the City of Rochester a petition reading as follows:

"*To the Honorable the Common Council of the City of Rochester.*

GENTLEMEN: The location of the tracks of the Rochester City & Brighton Railroad Company, the Cross Town Street Railway
75 Company, the South Park Street Railway Company and the Rochester Railway Company have, from time to time, been determined upon by the Common Council and the Executive Board since the year 1867. These locations have not, in many cases, been fixed with due and proper formality. In some cases the company, formerly owning and operating the street railroad, put its tracks on the side of the street, or in the center, as the property owners desired, without obtaining the consent, by resolution, of either the Common Council or the Executive Board. In some cases the right was granted to the company to construct a single track through a given street or avenue, and subsequently, with the consent of the owners of the abutting property, a double track has been laid and maintained, without such laying or maintenance being formally ratified or approved by your honorable body. A resolution was passed by the Common Council, granting the right to double track the street railroad on any street where a single track existed at the time of the passage of the resolution, providing the consent of the majority of the owners of the abutting property be obtained. Where a double track has been laid, under such circumstances, and the question of its right to maintain a double track is raised it is a tedious and expensive process to show that it has such right, and where the track has been laid between the curb and sidewalk, it is often difficult, as well as expensive, to prove all the facts necessary to show the right of the company to maintain and operate upon its track in the location in question. As the Rochester Railway Company, the successor of the companies before named, has substantially completed its system and is operating all of its cars with electric motive power, with the single trolley electric system, it seems right and proper that a formal resolution should be passed by your honorable body ratifying and approving of the location of its tracks, poles, wires and appurtenances as at present located and constructed. If it be
76 claimed that the location should be changed in any street or avenue, it would seem fair that such claim be made now.

The Rochester Railway Company, therefore, makes application for the consent of the local authorities of the City of Rochester to the location, construction, operation and maintenance of its railroad, tracks, poles, wires and other appliances, necessary for the operation

of such road in, through, along and upon the streets, avenues and public places hereinafter described, with the crossovers, side tracks, turnouts, etc., as hereinafter set forth. The location of such tracks, poles, wires and appurtenances to be as at present laid out, located and constructed, as follows:

(Then follows a description of the location of the tracks, poles and wires in each street in the City of Rochester in which the Rochester City & Brighton Railroad Company had constructed and maintained a track or tracks, and in which the defendant had maintained or constructed a track or tracks, and which description included the two streets, North St. Paul Street and Park Avenue, which are referred to in the complaint in this action, and also some of the streets for which franchises had been granted to the South Park Railroad and the Cross Town Railroad Company.)

The Rochester Railway Company also makes application for the consent of the local authorities of the City of Rochester for the erection and maintenance of insulated feed wire sufficient to supply its trolley wires with the current required in the economical operation of its road.

Respectfully submitted,

ROCHESTER RAILWAY COMPANY,
J. N. BECKLEY, *President.*"

The Common Council of the City of Rochester thereafter and on the 31st day of December, 1894, duly passed an ordinance
77 contained in the contract which is hereinafter set forth in full in the Finding of Fact, excepting the description of the streets, avenues and public places, which was made part of the ordinance, and a part of and contained in the contract hereinafter set forth.

That on the same day the Common Council adopted a resolution to the effect that the City Attorney draft a clause and it be inserted in and as a part of the foregoing resolutions, indemnifying and saving harmless the city from any loss it may suffer by reason of the location of any of the guard wires or other appurtenances of the said railroad company or by reason of the negligence of the same.

And further that the City Attorney be instructed to prepare a contract with the Rochester Railway Company in accordance with the terms of the foregoing resolutions, and that the Mayor be and he hereby is authorized and directed to execute the same on behalf of the City of Rochester.

That thereafter and on the 31st day of December, 1894, the defendant and the plaintiff entered into an agreement which embodied in full said resolutions, excepting a description of the location of the tracks in the streets, as set forth in the petition, a copy of which agreement is as follows:

"Agreement, made and entered into at Rochester, New York, on the thirty-first day of December, eighteen hundred and ninety-four, by and between the City of Rochester, a municipal corporation, and the Rochester Railway Company, a railroad corporation, witnesseth as follows:

The Rochester Railway Company by John N. Beckley, its President, hereby agrees to and with the City of Rochester, to accept, and in each and every thing and particular, well and truly comply with each and all of the provisions and conditions contained and
78 made in the following and accompanying resolutions as adopted by the Common Council of said city on the thirty-first day of December, 1894, and with all ordinances and resolutions of said Common Council; said Company, for itself, its successors, and assigns, further agrees at all times fully to indemnify and save harmless said city in the ratification and confirmation of the railroad and tracks of said company, and the adoption of the resolutions herein referred to, and also to indemnify and save harmless said city and its departments, of and from, any and all suits, actions and proceedings, as provided in the agreement made between said city and said company, dated February 25, 1890.

And the City of Rochester, by Merton E. Lewis, its acting Mayor, does hereby ratify and confirm the location of the railroad and tracks of said railroad company as set forth in the following or accompanying resolutions in accordance with the conditions therein expressed.

Said resolutions are hereby made a part of this agreement.

In witness whereof, the said, the City of Rochester has hereunto caused its corporate seal to be affixed and these presents to be signed by Merton E. Lewis, its acting Mayor, and said Rochester Railway Company has hereunto caused its corporate seal to be affixed and these presents to be signed by John N. Beckley, its President, at the City of Rochester, on the day and year first above written.

THE CITY OF ROCHESTER,
[L. S.] By MERTON E. LEWIS, *Acting Mayor.*
ROCHESTER RAILWAY COMPANY,
[L. S.] By J. N. BECKLEY, *President.*"

79 "STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this thirty-first day of December, 1894, before me, the subscriber, personally appeared John N. Beckley, to me personally known and known to me to be the President of the Rochester Railway Company, who, being by me duly sworn, did depose and say: That he is the President of the Rochester Railway Company; that he knows the corporate seal of said Rochester Railway Company; that the seal affixed to the foregoing instrument is the corporate seal of said Rochester Railway Company, and that such instrument was signed and sealed by him on behalf of said Rochester Railway Company, by authority of its Board of Directors. And the said John N. Beckley, as such President, duly asknowledged such instrument to be the free act and deed of said Rochester Railway Company.

M. G. GRAY,
Com'r of Deeds."

"STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this thirty-first day of December, 1894, before me, the subscriber, personally appeared Merton E. Lewis, to me personally known and known to me to be the acting Mayor of Rochester, who being by me duly sworn, did depose and say: That he is the acting Mayor of the City of Rochester; that he resides in said city; that he knows the corporate seal of said city; that the seal affixed to the foregoing instrument is the corporate seal of said city; that said instrument was signed and sealed by him as acting Mayor, on behalf of said city, by authority of the Common Council of said city, and that the said instrument was executed by the Rochester Railway Company and the acknowledgment of its President was taken
80 before the execution of said instrument by the City of Rochester. And the said Merton E. Lewis, as acting Mayor of said city, duly acknowledged said instrument to be the free act and deed of the City of Rochester.

M. G. GRAY,
Com'r of Deeds."

"By Ald. GREEN:

"Whereas, The Rochester Railway Company has duly applied in writing to the local authorities of the City of Rochester for a ratification and confirmation of the location of its railroad and tracks as operated and used through and along the streets, avenues and highways hereinafter named, and,

"Whereas, The Common Council upon the presentation of said written application, duly fixed the time for, and the place where the said application should be first considered, to wit: before the railroad committee of the Common Council, at the Common Council chamber, in the City Hall building, on the 31st day of December, 1894, at three o'clock p. m., and directed notice thereof to be published according to law; and,

"Whereas, The notice required by law, and the time when, and the place where said application would be first considered as aforesaid, was duly published in two daily newspapers of the City of Rochester, designated by the Mayor; and,

"Whereas, All persons appearing, in pursuance of said notice, were duly heard, and thereupon said railroad committee made a report to the Common Council at a meeting thereof, duly held at the Common Council chamber in the City Hall building, on the 31st day of December, 1894, at four o'clock p. m., recommending the adoption of the following resolutions; and,

"Whereas, Due consideration of the allegations presented having been heard, and due consideration having been had upon said application, it is
81 "Resolved, That the location of the railroad and tracks of said Rochester Railway Company as now operated and used by said company in the streets, avenues and highways hereinafter specifically described, is hereby ratified and approved, subject to such changes and alterations as the Common Council may from time to

time direct, and subject to all the rights and privileges now possessed by the city under existing contracts or agreements or by law, nevertheless upon the following conditions:

"First—That the provisions of Article Four of the Railway Law of the State of New York, being an Act in relation to railroads, constituting Chapter 39 of the General Laws of the State of New York, be complied with.

"Second—In order to increase the efficiency of the police system of said city, and that peace and good order may at all times be maintained in said city, and upon the cars of said company, and that the movement of the cars of said company be not interfered with by riotous or unlawful proceedings, that the said company, its successors and assigns furnish transportation without other consideration than the execution of an agreement on the part of said city embodying the terms of these resolutions, to not more than two policemen at a time upon each of the cars of said company, such transportation to be furnished only when said policemen are in full uniform and such transportation to continue as long as the Rochester Railway Company, its successors and assigns, shall operate, maintain and use its railroad in said city.

"It is further provided that on the written request of the superintendent of police, the said railroad company shall issue to the active detectives of the police force, to the number of not more than nine, tickets for not more than one hundred rides for each detective on the cars of the company in any one month.

82 "Third—In order that opportunity may at all times be afforded to the members of the paid fire department of said city to reach quickly the locality of any conflagration, that said company shall furnish like transportation for the same consideration hereinbefore expressed to not more than two firemen at a time upon each of the cars of said company, such transportation to be furnished only while said firemen are in full uniform and said transportation to continue as long as the Rochester Railway Company, its successors and assigns, shall operate, maintain and use its railroad in said city."

"Fourth—That all of the provisions of any agreement between the City of Rochester and any street railroad company, and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance or operation of street railroads within said city shall remain in full and binding force; and these resolutions shall not be construed as extending or affecting the franchise of any such company, or the time of the expiration of any such franchise, or the moneys required to be paid to said city by such company, or as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company."

"Fifth—That this ratification and confirmation of the location of the railroad and tracks of said company shall have the same effect as if said railroad and tracks had originally been laid with the proper consent and authority of said city, and no other effect or construction."

"Sixth—Said Rochester Railway Company, however, for the same consideration, agrees for itself, its successors and assigns, upon the written order of the Mayor, superintendent or chief of police, or fire commissioner of said city, or officers performing their duties,
83 in cases of emergencies, to transport upon each of its cars any number of policemen or firemen."

"It is further resolved that the streets, avenues, and highways in, through, along, and upon which the Rochester Railway Company may operate its railroad under this ratification and confirmation are as follows:" (Here follows description of streets, avenues and public places, and the location of tracks, as set out in the petition of Rochester Railway Company.)

XXVI.

That thereafter and beginning March 16th, 1897, and thereafter from time to time up to and after the decision of the Court of Appeals of the State of New York, in *Conway vs. The City of Rochester,* decided on the 18th day of October, 1898, the plaintiff claimed that the defendant was liable to pay for all paving when a street was improved with a new pavement between its tracks, the rails of its tracks and two feet outside, and the defendant claimed that it was not liable to pay for such paving in any street or streets where it or its predecessor, the Rochester City & Brighton Railway Company had obtained a franchise or constructed its railroad prior to the taking effect of the Railroad Law passed by the Legislature of the State of New York in the year 1890. And in the year 1899, the plaintiff commenced actions in the Supreme Court of the State of New York against the defendant to recover the expense of paving between the tracks, the rails of the track and two feet outside, in a large number of streets in which the defendant was operating its street railroad, in some of which the franchise had been obtained and the railroad constructed by the Rochester City & Brighton Railroad Company prior to the 6th day of May, 1884, and in some cases where the franchise had been obtained and the railroad constructed between the 6th day of May, 1884, and the first day of May, 1891, and in some of which the franchise had been obtained and the
84 road constructed after the first day of May, 1891. That the defendant interposed defenses to such actions and the same were, at the time of the making of the contract hereinafter referred to, pending undetermined.

That thereafter and in the year 1899, and the year 1901, the Legislature of the State of New York passed a large number of special acts authorizing the municipal authorities of the City of Rochester to assess upon the property of the defendant in the same manner that assessments were made upon the property of other persons for public improvements, the expense of paving between the tracks, the rails of the tracks and two feet outside, in different streets which had been paved by the City of Rochester, after the month of October, 1893, in which streets the defendant owned and operated its street surface railroad and in some of which streets the Rochester City & Brighton Railroad Company had obtained its

franchise and constructed its road prior to the 6th day of May, 1884, and in some of which streets said Rochester City & Brighton Railroad Company had obtained its franchise and constructed its railroad after the 6th day of May, 1884, and before the first day of May, 1891, and in some of which streets the defendant had obtained its franchise and constructed its road after first day of May, 1891.

That under and pursuant to such special acts, assessments were made against the property of the defendant in each of said streets for the expense of paving the space aforesaid, in the street in which such pavement was made, and the defendant commenced an action against the plaintiff in the Circuit Court of the United States for the then Northern District of New York, for the purpose of vacating and setting aside all of such assessments upon the ground that the acts of the Legislature of the State of New York, under which such assessments were made, were and each of them was void
85 and in controversion of the provisions of the Constitution of the State of New York and of the Constitution of the United States.

XXVII.

That while all of such actions were pending undetermined, the Legislature of the State of New York on the 26th day of April, 1901, passed Chapter 562 of the Laws of that year, entitled "An Act to authorize and empower the City of Rochester to enter into a contract with the Rochester Railway Company adjusting and settling all differences between the city and said railway company as to the amount due and owing from the company to the city for certain pavements heretofore made by the city, pursuant to Section 98 of the Railroad Law and providing for the payment of the same." That such act authorized the plaintiff and defendant to enter into a contract for the settlement of all such claims, and which act is hereby referred to with the same force and effect as if the text thereof were herein set forth at large.

That thereafter and on the 27th day of April, 1901, plaintiff and the defendant entered into an agreement dated that day, duly executed and acknowledged by the plaintiff, by George A. Carnahan, its Mayor, and executed and acknowledged by the defendant, by its President, and attested by its Secretary, under the corporate seal and approved by the corporation counsel of the plaintiff, which contract is as follows:

"This agreement, made this 27th day of April, in the year nineteen hundred and one, between Rochester Railway Company, a street railroad corporation duly incorporated under the laws of the State of New York, and having its principal office in the City of Rochester, New York, and hereinafter called 'the railway company,' party of the first part, and the City of Rochester, a municipal corporation of the State of New York, hereinafter called 'the city,' party of the second part, witnesseth:

86 Whereas, The city claims that the railway company is indebted to it in approximately the sum of three hundred and

eighty-six thousand dollars ($386,000), being for pavements made between the tracks, the rails of the tracks and two feet outside the tracks of the railway company, laid and operated in certain streets in the city, which pavements have been made and paid for by city in the past, and the city claims that in the future the railway company is required by Section 98 of the Railroad Law to make such pavements in all streets in which the railway company is operating its said railway; and

Whereas, The city has brought action in the Supreme Court of the State of New York to collect from the railway company a portion of said alleged indebtedness, which action is now pending undetermined; and

Whereas, In the year 1899, the city procured to be passed by the Legislature of the State of New York certain legislation authorizing the Common Council of the city to assess upon the property of the railway Company in certain streets the amount of the cost and expense of making the pavements aforesaid in certain streets, and there is pending in the United States Circuit Court an action brought by the railway company against the city to set aside such assessment under such legislation, on the ground that the same is in violation of the provisions of the Federal Constitution; and

Whereas, The Legislature of the State of New York has passed, and the Governor of the state has approved, in the year 1901, further legislation of the same kind, authorizing the Common Council to assess upon the tracks of the railway company in certain streets the amount of the cost and expense of making such pavements aforesaid; and

Whereas, The railway company claims that it is not liable to bear or pay any part of the expense of any pavements made between its tracks, the rails of its tracks and two feet outside in any
87 street in the City of Rochester in which its predecessor, the Rochester City & Brighton Railroad Company acquired a franchise or constructed a railroad prior to the 7th day of May, 1884, and also claims that it is not liable to pay for pavements made in any street in which its predecessor, the Rochester City & Brighton Railroad Company, acquired a franchise or constructed a railroad prior to the taking effect of the General Railroad Act of 1890; and

Whereas, It is desirable, in the interests of the public, that such controversy between the railway company and the city should be adjusted and settled;

Now, therefore, In consideration of the mutual covenants and agreements upon the part of the several parties hereto, and subject to the authorization of this agreement by the Legislature of the State of New York at its session for 1901,—this agreement not to be effective unless so authorized and legalized, it is hereby agreed as follows: In full satisfaction and discharge of the claim or claims for paving now held by the city against the railway company, amounting with interest to May 15th, 1901, to the sum of three hundred eighty-six thousand, six hundred and thirty-two dollars and forty-six cents ($386,632.46,) the railway company agrees to pay to the city on or

before the first day of June, 1901, the sum of one hundred and forty-six thousand, six hundred and thirty-two dollars and forty-six cents ($146,632.46,) and agrees to pay the remainder, to wit: the sum of two hundred forty thousand dollars ($240,000,) in fifteen equal annual installments of sixteen thousand dollars ($16,000) each,—the first payment to be made on the first day of July, 1902, and the first ten annual installments to be paid without interest, the last remaining five installments to bear interest at the rate of three and a half per cent. per annum from July 1st, 1911, upon the amount of principal remaining unpaid on July 1st, 1911,—and such remaining five installments to be payable with annual interest at the
88 rate aforesaid on all sums remaining unpaid at the time of each payment of an installment. And the city agrees to accept and receive said moneys so to be paid as aforesaid in full satisfaction and discharge of all claims now held and owned, or claimed to be held and owned, by it against the said railway company, for paving any streets in which the tracks of the railway company are situate, and which are referred to in the Ten Acts of the Legislature passed in 1899, and the twenty-one acts of the Legislature passed in the year 1901.

Second—The railway company will, and hereby does, waive any claim which it now makes to exemption from paying for pavements between the tracks, the rails of the tracks and two feet outside, in any streets which shall be hereafter paved, in which streets either the Rochester City & Brighton Railroad Company or the railway company obtained its franchise and constructed its tracks after the 7th day of May, 1884, and will promptly pay its proportion of the cost and expense of such pavements in accordance with the provisions of Section 98 of the Railroad Law, or as hereinafter provided.

Third—That as to all claims which may hereafter be made by the city against the railway company, for all pavements hereafter made in streets or parts of streets in the said city, in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, the question of the liability of the railway company to pay for making pavements in such streets, or parts of streets, between its tracks, the rails of its tracks and two feet outside, or any part thereof, shall be litigated and determined in a court having jurisdiction,—such questions to be raised as speedily as possible, in such manner as may be agreed upon by the corporation counsel of the city and the counsel of the railway company, and such questions to be finally judicially determined in the Courts.

89 It being expressly agreed and understood between the parties hereto that the question of the liability of the railway company to pay for paving hereafter made in any such streets or parts of streets in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, is not conceded by the railroad company, or waived by the city, but shall be judicially determined as aforesaid.

Fourth—It is further expressly agreed and understood by and

between the parties hereto that as to the liability of the railway company to pay for pavements which shall be hereafter made, in any streets in the City of Rochester, this agreement shall be expressly subject to any appeal, amendment or modification of the General Railroad Law of the State of New York imposing upon street railway companies the duty to make pavements between their tracks, the rails of their tracks and for two feet outside of their tracks, as now provided by Section 98 of the Railroad Law; and any such repeal shall inure to the benefit of the railway company the same as if this agreement had not been made, and any amendment or modification of such law shall inure to the benefit of the railway company or of the city, as the case may be, with the same force and effect as if this agreement had not been made.

Fifth—And the railway company hereby agrees that it will not oppose any legislation which the city may endeavor to secure, which legislation shall provide that in all streets hereafter to be improved by a new pavement from curb to curb, in which the railway company has laid its tracks and is operating its railroad, and so long as the General Railroad Law or any general statute requires street railways to pay for any part of a new pavement in streets in which their tracks are laid, the city may in the first instance provide by ordinance in the manner prescribed in the city's charter for the pavement of the whole street, without serving any notice upon
90 the railway company as now provided by Section 98 of the Railroad Law, and which legislation shall provide the manner in which the amount of the expense of such pavement to be borne by the railway company shall be determined, and providing for notice to the railway company of a hearing upon such question and the determination of the same, and providing that after the amount shall be so finally determined, in case the railway company shall not forthwith pay the same to the city, the city may cause the same to be levied and assessed upon the property of the railway company in such street, with interest from the time the said sum becomes due, and providing that such assessment shall be and become an assessment of the City of Rochester for a local improvement, and shall have the same force and effect as any assessment for a local improvement made pursuant to an ordinance of the Common Council of the City of Rochester, and shall be laid, spread and collected in the same manner as such local assessments are laid, spread and collected, in accordance with the Provisions of the Charter of the City of Rochester relating thereto, and providing that the Common Council, the assessors, the Treasurer and all officers and Boards of the city proceed to lay, spread, levy and collect the said sums so assessed in the manner provided by the Charter of the City of Rochester for the laying, spreading, levying and collecting of an assessment for a local improvement, and authorizing the City of Rochester to pursue all remedies for the collection of the sums so assessed that it is authorized to pursue by its Charter for the collection of an assessment for a local improvement made pursuant to an ordinance of the Common Council.

And the railway company agrees that until the final adjournment of the Legislature of 1902, the city may proceed and improve, by a

new pavement, such streets as it shall determine to improve from curb to curb, as hereinbefore provided, without giving to the railway company the notice prescribed by Section 98 of the Rail-
91 road Act, the giving of which notice the railway company hereby waives and expressly agrees to waive. But the railway company shall be entitled to receive a copy of the plans and specifications for such improvement between its tracks, the rails of its tracks and two feet outside, and does not waive its right to contest the amount charged to it by said city for the cost and expense of its share of such pavement.

Provided that such legislation, assessment and waiver of notice shall not apply to any pavements made in any street, or parts of streets, in which the railway company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, until it shall be finally determined as hereinbefore provided, that the railway company is liable to make or pay for such pavements in such streets or parts of streets.

Sixth—That the railway company shall keep in repair all pavements between its tracks, the rails of its tracks and two feet outside in all streets in which it maintains its tracks and operates its railway so long, and only so long as the statutes shall require such repairs.

Seventh—In consideration of the covenants and agreements upon the part of the city, and the performance of each and every of them by the city, the railway company agrees that it will, within three years from the first day of September, 1900, in addition to ordinary expenses of maintenance, expend at least the sum of seven hundred and fifty thousand dollars ($750,000,) in extensions and betterments of its railway construction, property and equipment, in reconstruction of its tracks and equipment, and erection and equipment of a power house, including in such sum the moneys paid by it for new pavements made after the first day of January, 1901, and previous to September 1st, 1903; provided, however, that in case the railway company shall be able to perfect arrangements with any com-
92 pany or individual supplying electrical power, to rent sufficient power to properly operate all its lines, and give as good and sufficient service as could be obtained from the construction of a new power house and plant, then and in that case, the railway company may omit to erect and equip such new power house, and in that case the sum of seven hundred and fifty thousand dollars hereinbefore agreed to be expended in the manner herein stated, shall be reduced to the sum of five hundred thousand dollars ($500,000.)

And the railway company further agrees that it will expend said sum of five hundred thousand dollars for the purposes hereinbefore stated other than the construction of a new power house and plant, within the following terms: a total of one hundred and fifty thousand dollars on or before the first day of January, 1902; on or before the first day of January, 1903; a sum which together with the amount expended up to the first day of January, 1902, shall be equal to three hundred and fifty thousand dollars, and on or before the first day of September, 1903, a sum which with the sums ex-

pended up to the first day of January, 1903, shall equal the sum of five hundred thousand dollars.

The sums hereinbefore agreed to be expended during the times herein stated are in addition to any sums which, under this article, the railway company may expend for a power house and the equipment thereof; and in case the railway company elects to construct and equip such power house, it may do so at any time prior to the first day of September, 1903.

And the railway company hereby expressly agrees that it will keep separate and detailed accounts of such expenditures so to be made by it as aforesaid within the times aforesaid, which detailed accounts shall show the sums of money expended by it for street improvements, extensions, roadway and tracks, overhead con-
93 struction, return wires and bonding, land and buildings, new motors, car-bodies and trucks, machinery and tools, dynamos, engines and boilers, supplies and such other improvements as shall come within the proper definition of "betterments."

And the railway company will permit the city officials, or such proper persons as they may authorize for that purpose, to examine the accounts of and contracts for such expenditures as aforesaid, in order to ascertain that the sum herein stated has been actually and in good faith expended.

And it is further expressly agreed and understood by and between the parties hereto, that in order to secure the city and to give assurance to it that the railway company will perform its agreement to expend the moneys aforesaid for the purposes aforesaid, and in view of the fact that in case of a failure on the part of the railway company to perform upon its part its covenant to make such expenditures aforesaid, that it would be practically impossible to ascertain the damages which would be sustained by the city by reason of the railway company's omission so to perform its said covenant, the damages sustained by the city by reason of such default and omission to perform, shall be and hereby are fixed and liquidated at a sum not exceeding one hundred and forty-six thousand dollars, which sum shall be regarded as fixed and liquidated damages, and not as a penalty.

The amount of such fixed and liquidated damages up to the maximum sum aforesaid to be that part of the sum hereinbefore agreed to be expended by it for the purposes aforesaid which it shall fail to expend within the times specified.

And in order to assure to the city the collection and payment of such fixed and liquidated damages, in case of default upon the part of the railway company, it is agreed that the city may use
94 the one hundred and forty-six thousand dollars to be paid by the railway company under the first clause of this agreement as it may choose, but such sum shall not be deemed to apply upon or be credited to the indebtedness herein conceded by the railway company to be due to said city until after the expiration of the time herein fixed for the expenditures of said money by the railway company in betterments, etc. In case the railway company shall perform its agreement to make such expenditures for betterments, etc., as

herein provided, then said sum of one hundred and forty-six thousand dollars shall be credited to the company as of the date of its payment, and in case the railway company shall fail, as hereinbefore provided, to make such expenditures within the times fixed herein, then, to the extent of its omission to make such expenditures within the times provided, said sum of one hundred and forty-six thousand dollars, or such part thereof as under this agreement represents the fixed and liquidated damages, shall be applied by the city to the payment of such damages, and the remainder, if any, of such sum of one hundred and forty-six thousand dollars shall be credited to the railway company as of the date of its payment.

Eighth—In case the railway company shall at any time fail to make payment of any annual installment, as fixed by the first clause of this agreement,—and such default shall continue for thirty days after such installment becomes due, then, and in that case, the entire amount of two hundred and forty thousand dollars ($240,000,) payable in installments, as provided in the first clause of this agreement, less any installments theretofore paid, with interest at three and a half per cent. upon the amount unpaid from the 15th day of May, 1901, shall at once become due and payable, and the city may take all legal measures to collect the same.

Ninth—That the city and the railway company will co-operate to secure any legislation deemed necessary to carry this agreement into effect.

95 Tenth—It is further expressly agreed and understood by and between the parties hereto that the pending litigation in the Circuit Court of the United States and in the Supreme Court of the State of New York, shall be discontinued without costs to either party as against the other. That the city may proceed under the twenty-one acts passed by the Legislature of 1901, and hereinbefore referred to, to make the assessments in the manner provided in said Acts, but said assessments when made shall not be enforced against the railroad company, or any steps taken for the enforcement thereof, so long as the railway company complies with this agreement and does not make default therein, but said assessments under said Acts and the assessments imposed under the Acts of 1899 and the liens acquired thereunder, shall stand as security for the performance by the railway company of its covenants herein, and for that purpose are conceded to be valid liens, and all claims as to their validity are hereby expressly waived. And all proceedings now authorized by law to be taken to enforce the collection of said liens shall be postponed until such time as the railway company shall make default in its said contract, and may then be taken with the same force and effect as though taken within the time now provided by law.

But it is expressly agreed and understood by and between the parties hereto, that the railway company does not waive its claim that all general statutes heretofore passed, and all general or special statutes hereafter to be passed, requiring the railway company to make pavements between its tracks, the rails of its tracks or two feet outside, or any part thereof, in streets where it obtained its franchise

or constructed a railroad prior to the 7th day of May, 1884, are violative of the Federal and State Constitutions, and expressly reserves the right to raise such questions as to the paving in such streets.

And when the railway company shall have fully performed this agreement upon its part, the city agrees to cancel and discharge of record said assessments and each of them, and vacate the lien created thereby by appropriate entries in the record of said assessments; and further agrees, if necessary, to use all reasonable effort to procure the repeal of said Acts, and each of them, to take any other further proceedings necessary to secure the vacation of said assessments, and each of them, and the release and cancellation of the lien created by said assessments and each of them.

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It is further expressly agreed and understood that nothing herein contained shall be deemed to affect, modify or alter any existing agreement between the Rochester City & Brighton Railroad Company and the City of Rochester, or between the Rochester Railway Company and the City of Rochester.

It is further expressly agreed and understood that these presents and everything herein contained are to bind the successors and assigns of the several parties hereto.

In Witness Whereof, The Rochester Railway Company has caused these presents to be subscribed by its president, attested by its secretary and the corporate seal to be hereunto affixed, and the City of Rochester has caused these presents to be signed by the Mayor of said city, duly authorized to make such subscription by an ordinance of its Common Council and has caused the corporate seal of said city to be hereunto affixed the day and year first above written.

ROCHESTER RAILWAY COMPANY,
[L. S.] By FREDERICK COOK, *President.*

Attest:
GEO. G. MOREHOUSE,
Secretary.

CITY OF ROCHESTER,
[L. S.] By GEO. A. CARNAHAN, *Mayor.*

97 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 27th day of April, in the year nineteen hundred and one, before me personally appeared Frederick Cook, to me personally known and known to be the President of the Rochester Railway Company, who being by me duly sworn did depose and say: that he is the President of said Rochester Railway Company; that he subscribed the name of said Rochester Railway Company to the foregoing agreement by authority of the Board of Directors of said company; that the seal annexed to said agreement is the corporate seal of said Rochester Railway Company, and he caused the same to be thereunto affixed and attested by the Secretary of said railway company by authority of the Board of Directors of said company.

EDWARD H. GEHRKE,
Notary Public.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 27th day of April, in the year nineteen hundred and one, before me personally appeared George A. Carnahan to me personally known to be the Mayor of the City of Rochester, who being by me duly sworn, did depose and say: that he subscribed the name of the City of Rochester to the foregoing agreement by virtue of an ordinance of the Common Council of the City of Rochester duly passed. That the seal annexed to said agreement is the corporate seal of the City of Rochester and he caused the same to be affixed to said agreement by virtue of an ordinance of the Common Council of said city, and he further says that he is the Mayor of the City of Rochester.

JOHN J. McINERNEY,
Commissioner of Deeds.

98 ROCHESTER, N. Y., *April* 27, 1901.

I hereby certify that the Mayor of the City of Rochester, who has executed the annexed contract on behalf of said city, had authority and power to make such contract, and that such contract is in proper form, under the laws of this State, and the ordinances and resolutions of the Common Council of said city, and is properly executed.

Dated, April 27th, 1901.

P. M. FRENCH,
Corporation Counsel.

XXVIII.

That North St. Paul street is now and was prior to the first day of January, 1872, a public street in the City of Rochester. That in April, 1900, the Common Council of the City of Rochester duly adopted an ordinance in words and terms as follows:

"By Ald. C. S. COOK:

Be it ordained by the Common Council of the City of Rochester: That that portion of St. Paul street from Main street east to the north line of the N. Y. C. & H. R. R. R. bridge between the tracks, the rails of the tracks, and for two feet outside of the outside rails of the tracks of the Rochester Railway Company requires paving and adjusting to grade, and that the said railway company be, and hereby is, required to pave and put in permanent repair that portion of said St. Paul street between the tracks, the rails of the tracks, and for two feet outside the outside rails of the tracks, within thirty days from the date of the serving of this notice, in accordance with the plans and specifications hereto attached, and in case of neglect of said corporation to make such pavement or repairs after the expiration of said period of thirty days, the Commissioner of Pub-
99 lic Works be, and hereby is, directed to make the same at the expense of said railway company, and that the City Clerk be directed to notify the said railway company of the adoption of this ordinance."

That thereafter the notice required by Section 98 of the Railroad Law was given by the City of Rochester to the defendant, requiring it to make such pavement between its tracks, the rails of its tracks, and two feet outside, together with specifications showing the manner in which such pavement was to be made, and the defendant, after the expiration of such thirty days' notice, and after the expiration of a reasonable time thereafter, neglected and refused to make such pavement.

That on the 9th day of October, 1900, the engineer of the City of Rochester duly submitted to the Common Council of said city pursuant to a resolution adopted by said Common Council, requesting the same, an estimate that the cost of constructing the block stone pavement on N. St. Paul street from Main street to Central avenue, included within a space between lines drawn two feet outside of the outside rails of the Rochester Railway Company, would be $18,000, and that the cost of constructing an asphalt pavement on the remainder of said North St. Paul street from Main street east to Central avenue, would be $38,500, and that thereafter and on the 9th day of October, 1900, the Common Council of the City of Rochester duly adopted a first ordinance in words and terms as follows:

"Be it obtained by the Common Council of the City of Rochester that the following improvement is necessary and should be made, viz:

The improvement of St. Paul street, from Main street east to Central avenue, also the square between Franklin street and
100 Central avenue, as follows: (1st). That part thereof included within the space between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with a block stone pavement; also the construction of a concrete foundation under such pavement and tracks, together with the necessary surface sewers in said tracks; (2d). That part thereof lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement. Also the construction of a Medina stone curb six inches thick on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present. The pavement shall extend to the street line at all intersecting street and alleys, except where permanent improvements now exist at proper lines and grades. Also manholes as follows: At each end of the main sewers, at all intermediate places as shall secure a manhole for every 300 feet of sewer. Also street laterals at all intersecting streets not now having sewer connections, of form and sufficiency approved by the Health Officer. Also surface sewers at the corners of all street intersections and at such intermediate places as shall secure a surface sewer for every 250 feet of street length. Also lot laterals to all vacant lots and lots having buildings thereon to which there is now no lateral conveyed, or none of form and sufficiency or in number as approved by the Health Officer. All manholes, surface sewers, street and lot laterals for such improvement to be in number, form and dimensions approved by the Health Officer, or on appeal, by the Commissioner of Public Safety as provided by Section 225 of the City Charter. Also the construction of water services to all vacant lots

and lots having buildings thereon to which there are now no water services, or none complying with the lawful regulations thereof, in number and dimensions conforming to all rules and regulations established under Section 110 of the City Charter. Also cross-
101 walks at all intersecting streets. Also the cleaning and repairing of so much of the main sewer as may be found necessary to restore it to its original condition.

Also the construction of a Portland cement walk or flag stone walk, from curb to street line, on each side of the street, except where cement or flagstone walks of the said width now exist, substantially as good as the new walk, which may be relaid if not conforming to the proper grade or alignment, within the limits mentioned.

The asphalt pavement shall be guaranteed and kept in repair for ten and the stone pavement for five years.

The asphalt surface shall be composed of one of the standard mixtures laid in this city for the past five years, or any other asphalt mixture that has been laid in quantities of at least three thousand square yards, and has worn well for a period of not less than three years.

The pavements and walks of intersecting streets shall be adjusted to the grade of the improvement.

And the City Engineer, under the direction of this Council, having made estimates (1st), of the expense of those portions of the improvement consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company; also the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks at $18,000, and (2d), also the paving of that part of said street lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement; also the construction and repair of the necessary lot laterals, water services, curbing and sidewalks within the street lines, at $38,500, and (3d), the aggregate estimated expense of all of said work at $56,500, all of which being deemed reasonable, are hereby approved.

102 And whereas, The Rochester Railway Company has been notified, pursuant to the provisions of Section 98 of Chapter 676 of the Laws of 1892, to pave between its tracks, the rails of its tracks, and for two feet outside of the outside rails of its tracks, and has refused to make such pavement.

It is further ordained, That the whole expense of the work, consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, be charged to, and collected from the Rochester Railway Company; and the expense of the work on the remainder of the improvements as above specified, is hereby directed to be assessed upon all of the following portion of the city, which this Council deems specially benefited by, and proper to be assessed for such improvement, to wit:

One tier of lots and parcels of land on each side of St. Paul street,

from Main street east to Central avenue; also one tier of lots and parcels of land on the east side of the square between Franklin street and Central avenue.

That thereafter a notice was published daily in the two official newspapers printed in the City of Rochester for four days, which notice reads as follows:

"CITY CLERK'S OFFICE,
ROCHESTER, N. Y., *Oct.* 17, 1900.

Notice is hereby given that all persons interested in the subject matter of the following described proposed improvements are requested to attend a meeting of the Common Council of the City of Rochester, appointed to be held October 23, 1900, at 7:30 p. m., in the Common Council Chamber, City Hall Building, when allegations will be heard:

103 St. Paul Street Asphalt Pavement.

The improvement of St. Paul street, from Main street east to Central avenue, also the square between Franklin street and Central avenue, as follows: (1st). That part thereof included within the space between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with a block stone pavement; also the construction of a concrete foundation under such pavement and tracks, together with the necessary surface sewers in said tracks; (2d). That part thereof lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement. Also the construction of a Medina stone curb six inches thick on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same at at present. The pavement shall extend to the street line at all intersecting streets and alleys, except where permanent improvements now exist at proper lines and grades. Also manholes as follows: At each end of the main sewers, at all intersecting sewers and at such intermediate places as shall secure a manhole for every 300 feet of sewer. Also street laterals at all intersecting streets not now having sewer connections, of form and sufficiency approved by the Health Officer. Also surface sewers at the corners of all street intersections and at such intermediate places as shall secure a surface sewer for every 250 feet of street length. Also lot laterals to all vacant lots and lots having buildings thereon to which there is now no lateral conveyed, or none of form and sufficiency or in number as approved by the Health Officer. All manholes, surface sewers, street and lot laterals for such improvement to be in number, form and dimensions approved by the Health Officer, or on appeal, by the Commissioner of Public Safety as provided by Section 225 of the City Charter. Also the construction of
104 water services to all vacant lots and lots having buildings thereon to which there are now no water services, or none complying with the lawful regulations thereof, in number and dimensions conforming to all rules and regulations established under Section 110 of the City Charter. Also crosswalks at all intersecting

streets. Also the cleaning and repairing of so much of the main sewer as may be found necessary to restore it to its original condition.

Also the construction of a Portland cement walk or flag stone walk, from curb to street line, on each side of the street, except where cement or flagstone walks of the said width now exist, substantially as good as the new walk, which may be relaid if not conforming to the proper grade or alignment, within the limits mentioned.

The asphalt pavement shall be guaranteed and kept in repair for ten and the stone pavement for five years.

The asphalt surface shall be composed of one of the standard mixtures laid in this city for the past five years, or any other asphalt mixtu that has been laid in quantities of at least three thousand square ards, and has worn well for a period of not less than three years.

The pavements and walks of intersecting streets shall be adjusted to the grade of the improvement.

The estimated expense is $56,500, of which $18,000 is to be charged to and collected from the Rochester Railway Company, the remainder to be assessed upon the following territory:

One tier of lots and parcels of land on each side of St. Paul street, from Main street east to Central avenue; also one tier of lots and parcels of land on the east side of the square between Franklin street and Central avenue."

105 That thereafter and on the 23d day of October, 1900, the allegations of all persons interested in said improvement who appeared were heard on that day, and the ordinance was laid on the table until the next regular meeting. That thereafter and on the 4th day of December, 1900, at a regular meeting of the Common Council of the City of Rochester, allegations were heard from all persons appearing in relation to the improvement described in said first ordinance, the defendant not appearing at either hearing, and thereupon the following final ordinance was adopted:

"The Common Council of the City of Rochester do ordain and determine that the following improvement is necessary and should be made, to wit:

The improvement of St. Paul street, from Main street east to Central avenue, also the square between Franklin street and Central avenue, as follows: (1st). That part thereof included within the space between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with a block stone pavement; also the construction of a concrete foundation under such pavement and tracks, together with the necessary surface sewers in said tracks; (2d). That part thereof lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement. Also the construction of a Medina stone curb six inches thick on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present. The pavement shall extend to the street line at all intersecting streets and alleys, except where permanent improvements now exist at proper lines and grades. Also manholes as follows: At each end of the main sewers, at all intermediate places as shall secure a manhole for every 300

feet of sewer. Also street laterals at all intersecting streets not now having sewer connections, of form and sufficiency approved
106 by the Health Officer. Also surface sewers at the corners of all street intersections and at such intermediate places as shall secure a surface sewer for every 250 feet of street length. Also lot laterals to all vacant lots and lots having buildings thereon to which there is now no lateral conveyed, or none of form and sufficiency or in number as approved by the Health Officer. All manholes, surface sewers, street and lot laterals for such improvement to be in number, form and dimensions approved by the Health Officer, or on appeal, by the Commissioner of Public Safety as provided by Section 225 of the City Charter. Also the construction of water services to all vacant lots and lots having buildings thereon to which there are now no water services, or none complying with the lawful regulations thereof, in number and dimensions conforming to all rules and regulations established under Section 110 of the City Charter. Also crosswalks at all intersecting streets. Also the cleaning and repairing of so much of the main sewer as may be found necessary to restore it to its original condition.

Also the construction of a Portland cement walk or flag stone walk, from curb to street line, on each side of the street, except where cement or flagstone walks of the said width now exist, substantially as good as the new walk, which may be relaid if not conforming to the proper grade or alignment, within the limits mentioned.

The asphalt pavement shall be guaranteed and kept in repair for ten and the stone pavement for five years.

The asphalt surface shall be composed of one of the standard mixtures laid in this city for the past five years, or any other asphalt mixture that has been laid in quantities of at least three thousand square yards, and has worn well for a period of not less than three years.

The pavements and walks of intersecting streets shall be adjusted to the grade of the improvement.

107 And the City Engineer, under the direction of this Council, having made estimates (1st), of the expense of those portions of the improvement consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company; also the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks at $18,000, and (2d), also the paving of that part of said street lying outside of lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company with an asphalt pavement; also the construction and repair of the necessary lot laterals, water services, curbing and sidewalks within the street lines, at $38,500, and (3d), the aggregate estimated expense of all of said work at $56,500, all of which being deemed reasonable, are hereby approved.

And whereas, The Rochester Railway Company has been notified, pursuant to the provisions of Section 98 of Chapter 676 of the Laws of 1892, to pave between its tracks, the rails of its tracks, and for

two feet outside of the outside rails of its tracks, and has refused to make such pavement.

It is further ordained, That the whole expense of the work, consisting of a block stone pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, be charged to, and collected from the Rochester Railway Company; and the expense of the work on the remainder of the improvements as above specified, is hereby directed to be assessed upon all of the following portion of the city, which this Council deems specially benefited by, and proper to be assessed for such improvement, to wit:

108 One tier of lots and parcels of land on each side of St. Paul street, from Main street east to Central avenue; also one tier of lots and parcels of land on the east side of the square between Franklin street and Central avenue."

That thereafter the plaintiff did, pursuant to said resolutions and ordinances, make and lay a new pavement in North St. Paul street from Main street to Central avenue, and did adjust the same to grade, and did make such re-pavement between the tracks, the rails of the tracks and two feet outside of the defendant's railroad in such street, and did adjust the same to grade in accordance with, and pursuant to, the specifications served on the defendant; and the plaintiff in making such improvement between the tracks, the rails of the tracks and two feet outside of the defendant's railroad in said streets, necessarily incurred an expense of $13,907.78, of which sum the expense of paving two feet each side of said tracks was $3,413.43; and on the 30th day of September, 1901, paid of such sum the sum of $4,200; and on the 23d day of November, 1901, paid of such sum the sum of $5,250, and on the 21st day of February, 1902, paid of such sum the sum of $4,457.78; that the re-payment of such sum to the plaintiff by the defendant has been demanded from it, and it has neglected and refused to pay the same or any part thereof.

That previous to the 6th day of May, 1884, the Rochester City & Brighton Railroad Company had constructed a street surface railroad in N. St. Paul street, from Main street to a point beyond Central avenue, and operated the same to the time of its lease to the defendant, and that for a long time previous to April 1st, 1900, and since such lease, defendant had operated, and has continuously operated since, and is now operating in said street a street surface railroad for public use in the conveyance of persons and property for compensation.

109 XXIX.

That Park avenue is now, and was prior to the first day of January, 1881, a public street in the City of Rochester. That on the 17th day of July, 1900, the Common Council of the City of Rochester duly adopted an ordinance in words and terms as follows:

"Be it ordained by the Common Council of the City of Rochester: That that portion of Park avenue from Alexander street to Meigs

street between the tracks, the rails of the tracks, and for two feet outside of the outside rails of the tracks of the Rochester Railway Company requires paving and adjusting to grade, and that the said railway company be, and hereby is, required to pave and put in permanent repair that portion of said Park avenue between the tracks, the rails of the tracks, and for two feet outside the outside rails of the tracks, within thirty days from the date of the serving of this notice, in accordance with the plans and specifications hereto attached, and in case of neglect of said corporation to make such pavement or repairs after the expiration of said period of thirty days, the Commissioner of Public Works be, and hereby is, directed to make the same at the expense of said railway company, and that the City Clerk be directed to notify the said railway company of the adoption of this ordinance."

That thereafter the notice required by Section 98 of the Railroad Law was given by the City of Rochester to the defendant, requiring it to make such pavement between the tracks, the rails of its tracks, and two feet outside thereof, together with specifications showing the manner in which such pavement was to be made, and the defendant, after the expiration of a reasonable time thereafter, neglected and refused to make such pavement.

110 That on the 4th day of June, 1901, the engineer of the City of Rochester duly submitted to the Common Council of said city, pursuant to a resolution adopted by said Common Council requesting the same, an estimate that the cost of the Park avenue improvement from Alexander street to Meigs street would be $14,500. That thereafter, and on the 4th day of June, 1901, the Common Council of the City of Rochester duly adopted a first ordinance in words and terms as follows:

"Be it ordained by the Common Council of the City of Rochester as follows:

SEC. 1. It is proposed to improve Park avenue from Alexander street to Meigs street by the construction of a pavement therein. Also the construction of a Medina stone curb, 4 inches thick, on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present.

SEC. 2. Such pavement is proposed to be constructed of brick, unless some other kind of pavement shall be designated pursuant to the provisions of "An Act for the government of cities of the second class," in which case it shall be constructed of the kind of pavement so designated. The pavement and incidental improvements shall be constructed in the manner set forth in an "Ordinance relating to the construction of pavements and incidental improvements in the City of Rochester," adopted by the Common Council on June 4, 1901.

SEC. 3. The whole expense of such improvement, except the expense of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the neces-

sary surface sewers in said tracks; estimated at $9,000, is
111 proposed to be assessed upon all of the following portion and part of the city, which this council deems proper to be assessed for the expense of such improvement, viz:

One tier of lots and parcels of land on each side of Park avenue, from Alexander street to Meigs street; and the expense of the balance of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, estimated at $5,500, to be charged to and collected from, the Rochester Railway Company."

That thereafter a notice was published daily for four days in the two official daily newspapers printed in the City of Rochester, which notice reads as follows:

CITY CLERK'S OFFICE,
ROCHESTER, N. Y., *June* 12, 1901.

Notice is hereby given that all persons interested in the following described proposed improvements are requested to attend at a meeting of the Common Council appointed to be held June 18, 1901, in the Common Council chamber, City Hall building, at 7:30 p. m., when allegations will be heard:

It is proposed to improve Park avenue from Alexander street to Meigs street by the construction of a pavement therein. Also the construction of a Medina stone curb, 4 inches thick, on each side thereof, connected with all streets, alleys and driveways. The width between curbs shall be generally the same as at present.

Such pavement is proposed to be constructed of brick, unless some other kind of pavement shall be designated pursuant to the
112 provisions of "An Act for the government of cities of the second class," in which case it shall be constructed of the kind of pavement so designated. The pavement and incidental improvements shall be constructed in the manner set forth in an "Ordinance relating to the construction of pavements and incidental improvements in the City of Rochester," adopted by the Common Council on June 4, 1901.

The whole expense of such improvement, except the expense of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks; estimated at $9,000, is proposed to be assessed upon all of the following portion and part of the city:

One tier of lots and parcels of land on each side of Park avenue, from Alexander street to Meigs street; and the expense of the balance of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks, estimated at $5,500, to be charged to and collected from, the Rochester Railway Company.

T. S. PULVER,
City Clerk."

That thereafter and on the 18th day of June, 1901, at a regular meeting of the Common Council of the City of Rochester, allegations were heard from all persons interested who appeared in relation to the improvement described in said first ordinance, but defendant did not appear, and thereafter the following final ordinance was adopted:

113 Be it ordained by the Common Council of the City of Rochester as follows:

SEC. 1. It is necessary to improve Park avenue from Alexander street to Meigs street by the construction of a pavement therein. Also the construction of a Medina stone curb, 4 inches thick, on each side thereof, connected with all streets, alleys, and driveways. The width between curbs shall be generally the same as at present.

SEC. 2. Such pavement shall be constructed of brick, unless some other kind of pavement shall be designated pursuant to the provisions of "An Act for the government of cities of the second class," in which case it shall be constructed of the kind of pavement so designated. The pavement and incidental improvements shall be constructed in the manner set forth in an "Ordinance relating to the construction of pavements and incidental improvements in the City of Rochester," adopted by the Common Council on June 4, 1901.

SEC. 3. The whole expense of such improvement, except the expense of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary surface sewers in said tracks; estimated at $9,000, is proposed to be assessed upon all of the following portion and part of the city:

One tier of lots and parcels of land on each side of Park avenue, from Alexander street to Meigs street; and the expense of the balance of the work consisting of a brick pavement between lines drawn two feet outside of the outside rails of the tracks of the Rochester Railway Company, and the construction of a concrete foundation under said pavement and tracks, together with the necessary

114 surface sewers in said tracks, estimated at $5,500, to be charged to and collected from, the Rochester Railway Company.

SEC. 4. The assessment to be so assessed shall be and become due and payable in ten equal annual installments."

That thereafter the plaintiff did, pursuant to said resolutions and ordinances, make and lay a new pavement in Park avenue from Alexander street to Meigs street, and did adjust the same to grade and did make such re-pavement between the tracks, the rails of the tracks and two feet outside of the defendant's railroad in such street, and did adjust the same to grade in accordance with, and pursuant to, the specifications served on the defendant; and the plaintiff in making such improvement between the tracks, the rails of the tracks and two feet outside thereof of the defendant's railroad in said street, necessarily incurred an expense of $4,356.24; and on the 2d day of December, 1901, paid of such amount the sum of $3,800, and on the 18th day of January, 1902, paid of such amount the sum of $556.24.

That previous to the 6th day of May, 1884, the Rochester City & Brighton Railroad Company had constructed a street surface railroad in Park avenue from Alexander street to a point beyond Meigs street, and continuously operated the same to the time of the lease to defendant, and that for a long time prior to July 1, 1900, and since the date of said lease, defendant had operated, and has continuously operated since, and is now operating in said street between said points a street surface railroad for public use in the conveyance of persons and property for compensation.

That no notice, or notices, other than those set forth in this finding or in finding number "twenty-eight," of the intention to improve either of said streets therein referred to, was given by
115 the authorities of the plaintiff to the defendant.

As conclusions of law, I find:

First—That the defendant is entitled to judgment, dismissing the complaint upon the merits. Let judgment be entered accordingly.

Dated, April 8, 1904.

E. A. NASH,
Justice of the Supreme Court.

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

To William W. Webb, Attorney for Defendant, City Hall, Rochester, N. Y.:

Take notice, that upon the summons and pleadings in this action and the decision of the court therein, and upon the affidavit, with a copy of which you are herewith served, a motion will be made at the Special term of this court, appointed to be held at the Court House, in the City of Rochester, in and for the County of Monroe, on the 16th day of April, 1904, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order permitting the defendant to tax an additional allowance of costs of five per cent. upon the amount demanded in the complaint,
116 together with the interest thereon, and insert in the judgment herein, together with the taxable costs, the amount of such additional allowance and for such other and further relief in the premises as shall be just.

Yours, etc.,
SATTERLEE, BISSELL,
TAYLOR & FRENCH,
Attorneys for Defendant,
9th Floor German Insurance Bldg., Rochester, N. Y.

Dated, April 13th, 1904.

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Charles J. Bissell, being duly sworn, says: I am one of the attorneys for the defendant in the above entitled action.

As shown by the findings of fact contained in the decision of the court in this action, this litigation has been before the state courts and the United States circuit Court for a number of years last past. The great and overshadowing question in the case has been from the beginning, whether the act of 1839, for the relief of the Rochester City & Brighton Railroad Company, was a contract between the State of New York and that company, granting upon the terms
117 and conditions therein stated, a franchise for the life of the company and consequently beyond the power of the Legislature to alter or amend, or whether the act was to be regarded as a mere amendment to the charter of that company, or an amendment to the General Railroad Act under which it acquired its charter, and consequently that there was a reserved right in the Legislature to alter, amend or repeal. A previous action was commenced by the City of Rochester at the time Mr. P. M. French was the Corporation Counsel, to recover for paving in a large number of streets, and that action was defended by myself, and Mr. William C. Trull, of New York, a lawyer of great experience and reputation, was employed to assist me. We together drafted the answer in that case, of which the answer in the present case is practically a duplicate. We devoted a great length of time to the study of this question and to an exhaustive examination of the various decisions in the federal courts and in the New York courts, and the courts of the various states in the Union. The same question, complicated with others, arose in the action brought by the Rochester Railway Company *vs.* The City of Rochester, to restrain it from proceeding under the several special acts which are mentioned in the findings herein. In those litigations, which formed the foundation of the present one and in which most of the study given to the question was had, my recollection is that the defendant paid to Mr. Trull for his services, upwards of three thousand dollars.

After the commencement of this action, which was defended by the firm of which I am a member, I spent many days in going over the old briefs, adding to them and in the examination of a number of new questions which had arisen and had been raised. I spent many days in going through the various ordinances passed by the City of Rochester since the year 1862, bearing upon the franchises of the Rochester Railway Company and of its predecessor, the Rochester City & Brighton Railroad Company, and I spent
118 many days in getting together accurately the facts upon which we could agree to submit the case. And after they had

been completed by me and a copy left with the Corporation Counsel for examination, it became necessary to alter and amend them in many ways and to add other facts raising different questions, which the Corporation Counsel deemed necessary to have incorporated in the agreed statement of facts. After many interviews and a great deal of alteration and rewriting of facts, they were finally agreed upon in the form as submitted to the court and I made the various supplemental briefs, which have been submitted to the court, treating the new questions which have been raised by the corporation counsel on the subject of the waiver of the constitutional right, if it existed, and the case was finally submitted to the court for decision and has been decided, but no judgment upon the decision has yet been entered. The case has been an extraordinarily difficult one and has involved most difficult and abstruse questions of constitutional law, involving a very large amount of labor upon my part, although the time occupied in the trial of the case itself, after the briefs had been prepared and the facts agreed upon, was of course trivial. I regard my services, over and above the amount of taxable costs, which cannot exceed seventy-five dollars, as worth upwards of two thousand dollars in the preparation of this case and the work expended in the examination of the various questions that have arisen, without any regard to the value of the services of myself and Mr. Trull in the past. An allowance of five per cent. upon the amount demanded in the complaint would by no means, together with the taxable costs, compensate me for the labor that I have expended upon this case alone.

CHAS. J. BISSELL.

Sworn to before me this 13th day of April, 1904.

CHAS. A. EDGERTON,
Com. of Deeds.

119 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

William A. Sutherland, being duly sworn, deposes and says: That he was Corporation Counsel of the City of Rochester from the first day of January, 1902, up to the first day of January, 1904, and appeared on behalf of the plaintiff in the above entitled action; that the facts in this case were agreed upon by the parties hereto, except as to one finding of fact, as to which testimony was taken; that only one witness was sworn herein, and his testimony was taken pursuant to stipulation before a stenographer, and such testimony submitted to the court; that this case was summed up and submitted to Mr. Justice Nash, and the argument and summing up of both counsel

did not occupy more than one hour; that the counsel for the defendant herein submitted to the court the printed brief in the action brought in the United States Circuit Court by the Rochester Railway Company against the City of Rochester, and also submitted herein an additional typewritten brief.

W. A. SUTHERLAND.

Sworn to before me this 16th day of April, 1904.
CHAS. L. PIERCE,
Com. of Deeds.

120 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

Benjamin B. Cunningham, being duly sworn, deposes and says: He is managing clerk in the office of the corporation counsel, and has been since the commencement of this action; that the facts herein were agreed upon between the parties, except as to one fact, as to which evidence was taken; that only one witness was sworn herein, John N. Beckley, whose evidence, pursuant to stipulation, was taken before a stenographer; that deponent appeared upon the examination of said witness, and such examination did not exceed one hour in length. That the action brought in the United States Circuit Court by the Rochester Railway Company against the City of Rochester, referred to in the affidavit of William A. Sutherland, was compromised and settled, and the action was discontinued in the year 1901, and an agreement compromising and settling said action was in said year entered into between said Rochester Railway Company and the City of Rochester.

B. B. CUNNINGHAM.

Sworn to before me this 16th day of April, 1904.
CHAS. L. PIERCE,
Com. of Deeds.

121 At a Special Term of the Supreme Court, held at the Court House in the City of Rochester, N. Y., on the 16th day of April, 1904.
Present: Hon. E. A. Nash, Justice.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

Upon reading and filing the affidavit of Charles J. Bissell, verified April 13, 1904, and the affidavits of William A. Sutherland and

Benjamin B. Cunningham, verified April 16th, 1904, and the notice of motion on the part of the defendant for extra allowance of costs in this action, after hearing Mr. P. M. French, of counsel for the defendant, in favor of such motion, and Mr. William W. Webb, of counsel for plaintiff, opposed, and it appearing that this is a difficult and extraordinary case where a defense has been interposed and that the sum claimed and the value of the subject involved exceeds the sum of Twenty Thousand Dollars ($20,000) it is hereby

Ordered, that an extra allowance of one thousand dollars ($1,000) in addition to costs, be and the same hereby is, awarded to the defendant herein.

JAMES L. HOTCHKISS, *Clerk.*

122 Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

The issues in the above entitled action having been duly noticed for trial and placed for trial upon the calendar of the trial term of this court, held at the Court House in the City of Rochester, in and for the County of Monroe, in the month of December, 1903, and the action having been duly reached upon the regular call of the calendar and duly moved for trial, and a jury having been waived in open court by the parties and the action tried by the court, and the court having heard the proofs and allegations of the parties and the admissions of fact made by the several parties upon the trial of the action and by written stipulation filed with the court, and the court having duly made and filed its decision in the office of the clerk of the County of Monroe on the 18th day of April, 1904, by which it is found, among other things, as a conclusion of law that the defendant is entitled to judgment dismissing the complaint upon the merits,

Now, on motion of Satterlee, Bissell, Taylor & French, attorneys for the defendant,

Ordered and adjudged, and this court hereby does order and adjudge, that the complaint in this action be and the same hereby is, dismissed upon the merits thereof.

And it is further ordered and adjudged, that the defendant recover of the plaintiff the sum of One Thousand and Ninety-seven Dollars and five cents, for its costs and disbursements, as taxed by the clerk.

JAMES L. HOTCHKISS, *Clerk.*

123 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

The plaintiff in the above entitled action, The City of Rochester, hereby excepts as follows to the findings and decision of the Court, made and filed herein:

First—The plaintiff excepts to that part of the twentieth finding of fact holding that the defendant in acquiring the capital stock of the Rochester City & Brighton Railroad Company, and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the reconstruction and re-equipment thereof, had, prior to the commencement of this action, expended upwards of $4,000,000; and also excepts to that part of said finding holding that such expenditure was made by the defendant in reliance upon the provisions of the act of 1869; and also excepts to that portion of said finding holding that such expenditure was made by the defendants in reliance upon the contract marked B, annexed to the answer, and the resolutions therein embraced; and the plaintiff excepts to the whole of said twentieth finding of fact.

Second—The plaintiff excepts to that part of the first conclusion of law holding that the defendant is entitled to judgment dismissing the complaint upon the merits; and also to that part of said
124 conclusion directing that judgment be entered accordingly, and to the whole of said first conclusion of law.

W. W. WEBB,
Corporation Counsel, Attorney for Plaintiff,
46 City Hall, Rochester, N. Y.

To Satterlee, Bissell, Taylor & French, Attorneys for Defendant, and to the Clerk of the County of Monroe.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

GENTLEMEN: Please take notice, that the plaintiff in the above entitled action, The City of Rochester, hereby appeals to the Appellate Division of the Supreme Court, Fourth Judicial Department, from the judgment of the Supreme Court entered in the above entitled action in the Monroe County Clerk's office on the 18th day of April, 1904, dismissing the complaint herein upon the merits, with $1,097.05 costs in favor of the defendant and against the plaintiff, and from each and every part and the whole of said judgment; and the plaintiff intends to review upon said appeal an order of the

Supreme Court entered in the office of the Clerk of the County
125 of Monroe on the 18th day of April, 1904, granting an extra allowance of $1,000 to the defendant herein.

Yours, &c.,
W. W. WEBB,
Corporation Counsel, Attorney for Plaintiff,
46 City Hall, Rochester, N. Y.

Dated at Rochester, N. Y., April 19, 1904.

To Satterlee, Bissell, Taylor & French, Attorneys for Defendant, and to the Clerk of the County of Monroe.

Supreme Court.

THE CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

Monroe Trial Term, December, 1903.

William A. Sutherland for plaintiff.
Charles J. Bissell for defendant.

NASH, *J.:*

This action is brought to recover of the defendant the expense of paving between the tracks, the rails of the tracks and two
126 feet outside of the tracks of the defendant's railway, on North St. Paul Street and Park Avenue in the City of Rochester.

In the case of Conway *v.* City of Rochester (157 N. Y., 33), an action brought by a taxpayer to restrain the letting of the contract to pave Lyell Avenue, on the ground that the city authorities had omitted to require the railway company to pave that portion of the street between the tracks, the rails of the tracks and two feet outside, it was held that the provision of Section 98 of the Railroad Law (Laws of 1890, Chap. 565, as amended, Laws of 1892, Chap. 676, Section 98), which requires that every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities, includes repairing with new material, and was in full force and effect as to all of the streets in which the Rochester Railway Company owned and operated a street railway.

The Rochester Street Railway Company was not a party to that action, and upon the facts which now appear claims that as to the streets for the expense of paving of which this action is brought, the statute is inoperative and void, for the reason that it impairs the obligation of certain existing contracts operative as between the city and the railway company.

On or about May 31st, 1862, the Rochester City & Brighton Railroad Company was duly incorporated under and pursuant to the

provisions of the General Railroad Act of 1850 (Laws, Chap. 140). The route described in the Articles of Association of the Rochester City & Brighton Railroad Company is identical with certain of the routes described in the Articles of Association of the defendant.

127 On or about the 24th day of June, 1862, the Common Council of the City of Rochester, in the exercise of the authority conferred upon it by the General Railroad Law of 1850, consented to the construction by the Rochester City & Brighton Railroad Company of a street surface railroad upon the routes designated in its Articles of Association, and one of the conditions of the grant was that the grantee should improve with suitable materials as required by the Common Council of the city, and in a proper manner between its tracks, the rails of its tracks and for two feet four inches outside thereof, and should keep the surface of the street inside the rails and for two feet four inches outside thereof in good repair. Thereafter and on the 8th day of July 1862, said Rochester City & Brighton Railroad Company duly accepted the grant, subject to the provisions and restrictions therein contained.

On or about the 16th day of October, 1862, the Rochester City & Brighton Railroad Company mortgaged its rights, privileges, property and franchises to Hobart F. Atkinson, as trustee. This mortgage was duly foreclosed and at the foreclosure sale the rights, privileges, property and franchises of the Rochester City & Brighton Railroad were purchased by one Chauncey B. Woodworth.

After the acceptance of said franchise from the City of Rochester, and before default in the fulfillment of the conditions of said mortgage, the said Rochester City & Brighton Railroad Company proceeded to and did construct its said railroad in a number of the streets named in the said resolution of the Common Council, and in its Articles of Association, and thereafter it operated its cars thereon, and duly complied with all the provisions of said ordinance.

On or about March 5th, 1868, pursuant to the statutes of the State, Mr. Woodworth duly associated with himself as such purchaser certain persons, and duly incorporated a company by the name of the Rochester City & Brighton Railroad Com-

128 pany, for the purpose of operating the railroad theretofore operated by its predecessor corporation, the Rochester City & Brighton Railroad Company.

By the terms of these last Articles of Association the company was to continue for ninety-nine years.

Immediately after the incorporation of the new corporation known as the Rochester City & Brighton Railroad Company by the purchaser and his associates, the new company petitioned the Common Council, protesting against the onerous condition of the resolution of 1862, above quoted, and setting forth the inability of the new corporation to proceed with the operation of the railroad subject to such conditions, and the fact that the road had never paid, owing to the existence of such conditions. Thereafter and for the space of upwards of a year, the question was debated in the Common Council, committees appointed and various hearings had and proofs offered by the company as to the expense of building, maintaining

and operating the road, and finally the Common Council on the 12th day of January, 1869, duly amended section two of the ordinance of 1862, so as to read as follows: "The track of said railroad shall be laid so as to permit the free passage of vehicles and carriages over the same, and the rails shall be laid even with the surface of the streets and shall conform to the grades thereof as now established, or as they shall from time to time be established, or altered. Said company shall, as soon after the adoption of this ordinance as the condition of the streets through which their track is laid will permit, put the surface of said streets inside the rails and for one foot outside thereof, in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council, and shall thereafter keep said streets in good repair inside its tracks or between the rails of their tracks, only during the term of five years, and whenever it becomes necessary to improve by ordinance or
129 otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same, during the term of five years from the adoption of this ordinance."

Shortly after the adoption of said resolution the Rochester City & Brighton Railroad Company caused to be prepared and submitted to the city authorities a proposed act of the Legislature, legalizing the action of the Common Council, and the same was transmitted to the Common Council by the Mayor of the city, with a written request that the Common Council by resolution approve and direct the clerk to transmit the bill to the Legislature, whereupon the Common Council adopted the following resolution: "Resolved, That the clerk of this board be authorized to transmit a copy of the bill relating to street railroads presented by the Mayor to this board, to the Legislature, requesting said body to legalize the action of the Common Council by the passage of said bill."

On or about the 12th day of February, 1869, said act was passed by the Legislature and duly signed by the Governor, and is entitled, "An Act for the relief of the Rochester City & Brighton Railroad Company," and is known and designated as Chapter 34 of the Laws of 1869.

The provision of the Act of 1869 is as follows:

"SEC. 5. Said company shall put, keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently im-
130 proved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but shall make its rails in such street or streets conform to the grade thereof."

Thereafter the said Rochester City & Brighton Railroad Company continued to maintain and operate its street surface railroad under the general statutes of the State of New York, and with the consent of the Common Council extended its railroad into many other

streets and parts of streets in the City of Rochester, incurring thereby large expense and expending large sums of money therefor, the exact amount of which does not appear. The company kept in repair the pavement as required, but whenever a street was improved by a new pavement it was not called upon by the authorities of the City of Rochester to make or pay for any part of such improvement. On the 18th of May, 1880, the Common Council of the City of Rochester re-enacted the ordinance of 1862 as amended in 1869.

On the 29th of March, 1887, the Common Council of the City passed an ordinance in relation to street railroads, section two, which ordinance is as follows:

"SECTION 2. The track of said railroad shall be so laid as to permit the free passage of vehicles and carriages over the same, and the rails shall be laid even with the surface of the streets and avenues, and shall conform to the grades thereof, as now established, or as they shall from time to time be established or altered. As soon after the adoption of this ordinance as the condition of the streets and avenues, through or along which any street surface railroad track is now laid will permit, the surface of such streets and avenues inside the rails of all tracks authorized to be laid prior to May 6, 1884, and between the tracks and rails of such tracks and for a space two feet in width outside and adjoining the outside rails of the tracks of any and all extensions or branches of any railroad authorized
131 to be constructed since May 6, 1884, shall be put in good and thorough repair by the company, under the direction of the Executive Board of said city, and thereafter at all times the same shall be in like manner and degree kept and maintained; as to the tracks authorized to be constructed or laid prior to the 6th day of May, 1884, the surface of said streets and avenues inside and between the rails thereof, and roads, and any and all extensions and branches of any roads authorized to be constructed or laid since May 6, 1884, between the tracks and the rails of the tracks, and a space two feet in width outside and adjoining the outside rails of the track or tracks."

On the 21st of January, 1890, the Rochester City & Brighton Railroad Company petitioned the Common Council for permission to change its motive power from horse to the overhead system of electricity, commonly known as the "trolley system." The prayer of the petition was duly granted by resolution of the Common Council in which it was provided, "that the consent and permission of the City of Rochester is hereby granted to the Rochester City & Brighton Railroad Company, its successors and assigns, in addition to the rights, privileges and franchises now possessed by it, to establish, construct, maintain, operate and use the overhead single trolley electric system of motive power, so called, in the operation of its cars, in and on each and all of the streets, avenues and public places in the City of Rochester, in, along, through and upon which said company has constructed and is now maintaining and operating a street surface railroad, and to construct, set, lay, maintain and use the poles, wires, appliances and such electrical appliances and apparatus, and to make the underground and surface alterations to and

on each and all of the said streets, avenues and public places so far as necessary for that purpose; but said company, its successors and assigns, shall not have the right to construct and operate said electric railroad in any street until the requisite consents of property
132 owners on such streets, avenues or places, and the consent of the Board of Railroad Commissioners of the State of New York shall be obtained as required by law."

The material to be used and the manner of construction and maintenance were particularly set forth in the resolutions, and it was further provided that, before the grant and consent should become operative the said company should deliver to and leave with said committee a written agreement with the city to accept and in each and every particular comply with each and all of the provisions contained in the resolutions, and to well and truly, at all times, comply with all ordinances and resolutions of the Common Council of said city not in conflict therewith, which had at any time before or which might at any time thereafter be passed, relating to the rate of speed, etc., and the general repairs of the streets within and for two feet outside of and adjoining said company's track or tracks.

In accordance with and pursuant to said resolutions the Rochester & Brighton Railroad Company on the 25th of February, 1890, made and entered into the proposed contract in writing, by which the company accepted the conditions imposed, and agreed to comply with all the ordinances and resolutions of said Common Council not in conflict with said resolutions, which had at any time before, or which might be at any time thereafter passed, relating to the rate of speed, etc., and the general repairs of the streets within and for two feet outside of and adjoining said company tracks.

On the 25th of February, 1890, the Rochester City & Brighton Railroad Company duly executed, and delivered to the defendant a lease of all its property, franchises, rights and privileges of every kind and description, for the unexpired term of its charter, pursuant to the provisions of the statutes of the State in such case made and provided. The defendant duly accepted said lease and there-
133 upon entered into the possession of the demised railroad and property; thereafter, and in the year 1890, the defendant, being the lessee of the Rochester City & Brighton Company, duly acquired pursuant to the statutes of the State, the entire capital stock of the Rochester City & Brighton Railroad Company.

Thereafter in the year 1890, the defendant applied to the Board of Railroad Commissioners of the State of New York for permission to change the motive power of the railroad so acquired by it, and of such extensions thereof as were contemplated and as were embraced in its Articles of Association and in said Act of 1869, from horse power to electricity. That such proceedings were thereupon had, that in said year the board of Railroad Commissioners of the State of New York duly granted such permission to the defendant, and the property owners in the several streets in which such change was to be made duly gave their consent to such change. Immediately thereafter, beginning in the year 1890, the defendant, at great expense, proceeded to and did reconstruct the entire railroad which it had acquired from the Rochester City & Brighton Railroad Com-

pany, and equipped the same with electrical appliances. That in making such change of motive power to electricity, as aforesaid, it became and was necessary for the defendant to, and the defendant did reconstruct in its entirety the road so acquired by it as aforesaid, including the replacing of the ties, rails and foundation, with new material, and in replacing all of the cars with new motor power. That previous thereto the cars of said company running on said railroad were operated by horse power.

The defendant in acquiring the capital stock of the Rochester City & Brighton Railroad Company and in the conversion of said railroad from a horse railroad to an electrical railroad, and in the re-
construction and re-equipment thereof, had, prior to the com-
134 mencement of this action, expended upwards of four millions of dollars, and that such expenditure was made by the defendant in reliance upon the provisions of said Act of 1869, and in reliance upon said contract of February 25th, 1890.

After the making of the said contract of February 25th, 1890, and up to the time of the lease to the defendant, the said Rochester & Brighton Railroad Company duly complied with and performed all the conditions of the said contracts by it agreed to be performed, and that since the making of said lease the defendant has duly complied with and performed all the conditions and obligations of said contracts on its part to be performed, but it never prior to March 16th, 1897, constructed or paid for any portion of a new pavement in any street or streets through which it maintained and operated its railroad. That since the passage of the Act of 1869 and up to March 16th, 1897, neither the Rochester City & Brighton Railroad Company or the defendant, has ever been assessed for or required to pay any portion of the expense of a new or permanent improvement of any portion of any street, avenue or highway in which the Rochester City & Brighton Railroad Company, obtained its franchise or constructed its road prior to the 6th day of May, 1884. That after the passage of Chap. 252 of the Laws of 1884, the Rochester City & Brighton Railroad Company obtained from the municipal authorities of the City of Rochester various consents to extend its tracks and railroads into various streets of the City of Rochester, and the municipal authorities of the City of Rochester have from time to time granted such consents upon the condition provided for in Chapter 252 of the Laws of 1884, as follows: "Upon the express condition that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with," and since the lease to the defendant of the property and franchises of the Rochester City & Brighton Rail-
road Company and the filing of the certificate of the acqui-
135 sition of all of its capital stock, the defendant has applied to the municipal authorities of the City of Rochester for consent to extend its railroad into various streets of the City of Rochester, named in its Articles of Association or in certificates of extension filed by it, and the municipal authorities have granted such right or franchise to make such extension since the passage of the General Railroad Act, known as the Railroad Law, and such consents have had annexed the condition required by the provisions of the General Railroad Act, as follows: "That the foregoing consent is given

upon the following conditions expressly, to wit: that the provisions of Article IV of the Railroad Law pertinent thereto shall be complied with." And both the Rochester City & Brighton Railroad Company and the defendant acted upon such consents and made and built the extensions into such various streets under such consents.

On the 11th of December, 1894, the defendant presented to the Common Council of the city a petition, stating that the location of the tracks of the Rochester City & Brighton Railroad Company and other railroad companies to the rights of which the defendant had succeeded and the tracks of the railroad of the defendant as laid, had not been fixed with due and proper formality, although resolutions from time to time granting the right had been passed by the Common Council, and the consents of property owners obtained; and that the defendant having substantially completed its system of operating its cars with electric motive power, it seemed right and proper that a formal resolution of the Common Council should be passed ratifying and approving of the location of its tracks, poles, wires and appurtenances, as then at present located and constructed.

The defendant therefore made application for the consent of the authorities of the city, to the location, construction, operation
136 and maintenance of its railroads, in, through, along and upon the streets of the city where it had been constructed, setting forth a description of the location of the tracks, etc., in each of the streets in which the defendant had constructed its tracks, which description included the said two streets, North St. Paul Street and Park Avenue.

Thereupon the Common Council passed an ordinance embodied in certain resolutions containing the conditions upon which the city would grant the prayer of the petition, and directed the City Attorney to prepare a contract in accordance therewith.

The contract was so made and executed by and on behalf of the city and the defendant on the 31st of December, 1894; it provided that the defendant would in each and every particular comply with the conditions contained in the resolutions adopted by the Common Council; and on the part of the city, that it thereby ratified and confirmed the location of the railroad and tracks of the defendant as set forth in the resolutions, in accordance with the conditions therein expressed.

The conditions imposed, including the consideration moving to the city, set forth in the resolutions, were as follows:

"Resolved, That the location of the railroad and tracks of the said Rochester Railway Company as now operated and used by the said company in the streets, avenues and highways hereinafter specifically described, is hereby ratified and approved, subject to such changes and alterations as the Common Council may from time to time direct, and subject to all the rights and privileges now possessed by the city under existing contracts or agreements or by law, nevertheless upon the following conditions:

First—That the provisions of Article Four of the Railway
137 Law of the State of New York, being an act in relation to railroads constituting Chapter 39 of the General Laws of the State of New York be complied with.

Second—In order to increase the efficiency of the police system of said city, and that peace and good order may at all times be maintained in said city, and upon the cars of said company, and that the movement of the cars of said company be not interfered with by riotous or unlawful proceedings, that the said company, its successors and assigns furnish transportation without other consideration than the execution of an agreement on the part of said city, embodying the terms of these resolutions to not more than two policemen at a time upon each of the cars of said company, such transportation to be furnished only when said policemen are in full uniform and such transportation to continue so long as the Rochester Railway Company, its successors and assigns shall operate, maintain and use its railroad in said city.

It is further provided that on the written request of the superintendent of police, the said railroad company shall issue to the active detectives of the police force, to the number of not more than nine, tickets for not more than one hundred rides for each detective on the cars of the company in any one month.

Third—In order that opportunity may at all times be afforded to the members of the paid fire department of said city to reach quickly the locality of any conflagration, that said company shall furnish like transportation for the same consideration hereinbefore expressed to not more than two firemen at a time upon each of the cars of said company, such transportation to be furnished only while said firemen are in full uniform, and said transportation to continue so long as the Rochester Railway Company, its successors and assigns, shall operate, maintain and use its railroad in said city.

138 Fourth—That all the provisions of any agreement between the City of Rochester and any street railroad company, and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance or operation of street railroads within said city shall remain in full and binding force; and these resolutions shall not be construed as extending or affecting the franchise of any such company, or the time of the expiration of any such franchise, or the moneys required to be paid to said city by such company, or as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company.

Fifth—That this ratification and confirmation of the location of the railroad and tracks of said company shall have the same effect as if said railroad and tracks had originally been laid with the proper consent and authority of said city, and no other effect or construction.

Sixth—Said Rochester Railway Company, however, for the same consideration, agrees for itself, its successors and assigns, upon the written order of the mayor, superintendent or chief of police, or fire commmissioner of said city, or officers performing their duties, in cases of emergencies, to transport upon each of its cars any number of policemen or firemen."

Thereafter and beginning March 16th, 1897, and thereafter from time to time up to and after the decision of the Court of Appeals,

in Conway *vs.* the City of Rochester, decided on the 18th day of October, 1898, the plaintiff claimed that the defendant was liable to pay for all paving when a street was improved with a new pavement between its tracks, the rails of its tracks and two feet outside, and the defendant claimed that it was not liable to pay for such paving in any street or streets where it or its predecessor, the Rochester City & Brighton Railroad Company, had ob-
139 tained a franchise or constructed its railroad prior to the taking effect of the Railroad Law, passed by the Legislature of the State of New York in the year 1890; and in the year 1899, the plaintiff commenced actions in the Supreme Court of the State of New York against the defendant to recover the expense of paving between the tracks, the rails of the tracks and two feet outside, in a large number of streets in which the defendant was operating its street railway, in some of which, the franchise had been obtained and the railroad constructed by the Rochester City & Brighton Railroad Company prior to the 6th day of May, 1884, and in some cases where the franchise had been obtained and the railroad constructed between the 6th day of May, 1884, and the first day of May, 1891, and in some of which the franchise had been obtained and the road constructed after the 1st day of May, 1891. The defendant interposed defenses to such actions and the same were, at the time of the making of the contract hereinafter referred to, pending undetermined. That thereafter and in the year 1899, and the year 1901, the Legislature of the State of New York passed a large number of special acts authorizing the municipal authorities of the City of Rochester to assess upon the property of the defendant in the same manner that assessments were made upon the property of other persons for public improvements, the expense of paving between the tracks, the rails of the tracks and two feet outside, in different streets which had been paved by the City of Rochester after the month of October, 1893, in which streets the defendant owned and operated its street surface railroad and in some of which streets the Richester City and Brighton Railroad Company had obtained its franchise and constructed its road prior to the 6th day of May, 1884. That under and pursuant to such special acts assessments were made against the property of the defendant in each of said streets for the expense of paving the space aforesaid, in the street in which such pavement was made, and the defendant
140 commenced an action against the plaintiff in the Circuit Court of the United States for the then Northern District of New York, for the purpose of vacating and setting aside all of such assessments upon the ground that the acts of the Legislature of the State of New York under which such assessments were made, were and each of them was void and in controversion of the provision of the Constitution of the State of New York and of the Constitution of the United States. That while all of such actions were pending undetermined, the Legislature of the State of New York, on the 26th of April, 1901, passed Chap. 562 of the laws of that year, entitled "An Act to authorize and empower the City of Rochester to enter into a contract with the Rochester Railway Company adjusting and

settling all differences between the city and the said railway company as to the amount due and owing from the company to the city for certain pavements heretofore made by the City, pursuant to Section 98 of the Railroad Law and providing for the payment of the same." That such act authorized the plaintiff and the defendant to enter into a contract for the settlement of all such claims.

Thereafter and on the 27th day of April, 1901, plaintiff and the defendant entered into an agreement dated that day, duly executed and acknowledged by the plaintiff, by George A. Carnahan, its Mayor, and executed and acknowledged by the defendant by its President, and attested by its Secretary, under the corporate seal, and approved by the corporation counsel of the plaintiff, which contract recited the matters in difference between the city and the defendant, and in settlement thereof provided that the defendant should pay to the city in full satisfaction and discharge of its claims for paving, the sum of three hundred eighty-six thousand six hundred thirty-two dollars and forty-six cents, and the defendant agreed to waive any claim for exemption from paying for pavements thereafter laid in streets in which it or the Rochester City &
141 Brighton Railroad Company obtained a franchise and constructed tracks after May 7th, 1884, but that, "as to all claims which may hereafter be made by the city against the railway company, for all pavements hereafter made in streets or parts of streets in the said city, in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, the question of the liability of the railway company to pay for making pavements in such streets, or parts of streets, between its tracks, the rails of its tracks and two feet outside, or any part thereof, shall be litigated and determined in a court having jurisdiction, such questions to be raised as speedily as possible, in such manner as may be agreed upon by the corporation counsel of the city and the counsel of the railway company, and such questions to be finally judicially determined in the courts. It being expressly agreed and understood between the parties hereto that the question of the liability of the railway company to pay for paving hereafter made in any such streets or parts of streets in which the Rochester City & Brighton Railroad Company obtained its franchise or constructed a railroad prior to the 7th day of May, 1884, is not conceded by the railway company, or waived by the city, but shall be judicially determined finally as aforesaid.

The Court of Appeals in the Conway case did not have before it the several ordinances and agreements constituting the various contracts made by and between the City of Rochester and the Rochester City & Brighton Railroad Company and the Rochester Railway Company. The contention on behalf of the city there was that the provisions of the General Railroad Act of 1890, amended in 1892, only required repairs to be made by railroad companies, and did not include the construction of new pavements, and if new pavements were included the Rochester Railway Company was exempted by a special statute from making or contributing toward the expense

thereof. Although reference was made to the Act of 1869,
142 for the relief of the Rochester City & Brighton Railroad Company in the brief of counsel for the city, no allusion or reference is made to that act in the opinion.

It seems to be well settled law that the ordinance or resolutions of the Common Council of a city consenting to the use of its streets by a railroad corporation when accepted by the corporation, constitute a contract.

In the case of the Brooklyn Central Railroad Company *v.* The Brooklyn City Railroad Company (32 Barbour, 354), it is said, speaking of the resolutions of the Common Council of the City of Brooklyn, granting its assent to the construction of a railroad, "the resolution * * * constituted a contract which the company was bound to perform, and which the Common Council could not rescind without adequate cause." (p. 364.) Again on page 366 of the same case, reference is made to the observations upon the same question by Chancellor Kent, as follows: "Speaking of franchises, Chancellor Kent in his commentaries says, (vol. 3, p. 458), 'they contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the duties and conditions described in the grant. The government cannot resume them at pleasure, or do any act to impair the grant without a breach of the contract."

In Milhau *v.* Sharp (27 N. Y., at page 620), the Court, in considering a resolution of the Common Council of the City of New York, granting authority to contract and operate a railroad, says: "It was not, as has been insisted, an act of legislation, but on the contrary, possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of The People *v.* Sturtevant (9 N. Y., 273), and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior
143 to its acceptance by the defendants, the resolution was only a proposition having no binding force whatever. It was certainly not then a law, and since that time the Common Council have taken no action upon it. Upon its acceptance (if valid) it became a contract between two parties, binding each to the observance of all its provisions. * * * The defendant's counsel insists that the resolution is not a contract, but a license, revocable at the pleasure of the Common Council. This proposition cannot be reconciled with the decision in The People *v.* Sturtevant (*supra*) nor with the principle declared by the Supreme Court of the United States, in the Dartmouth College case (4 Wheat., 519), and other kindred cases in substance, that grants of such franchises, though made by acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified, except in accordance with express reservations contained in the grants."

In Skaneateles Water Works Co. *v.* Village of Skaneateles (161 N. Y., 154) the Court had under consideration the effect of certain statutes affecting the rights of the parties, the opinion at page 166, states: "We are thus brought to an examination of the statutes, and our first inquiry will be whether they merely threaten parties in the

plaintiff's situation with the consequences of local municipal competition, or constitute an invasion of their grants. The former, as we have seen, is permissible. But the latter may not be done, but the doctrine has been settled since the Dartmouth College case (4 Wheat., 518), that a grant of corporate powers by the sovereign to an association of individuals for public use, constitutes a contract within the meaning of the Federal Constitution, prohibiting a State Legislature from passing laws impairing its obligations. In the recent case of Pearsall *v.* Great Northern Railroad Company (161 U. S., 646), the Court, after a brief review of the Dartmouth College case, said:

"Subsequent cases have settled the law that wherever charter
144 rights have been acquired by virtue of the corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation." Intermediate the cases cited there are many cases in the Supreme Court of the United States in which the doctrine referred to has been either asserted or made the basis for the decision, as in N. O. Gas Co. *v.* Louisiana Light Co. (115 U. S., 650); N. O. Water Works Co. *v.* Rivers (115 U. S., 674); Louisville Gas Co. *v.* Citizens' Gas Co. (115 U. S., 683); these were cases where the grants were of an exclusive right to supply gas or water to a municipality. That court has taken frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation, and in a series of decisions extending over many years has held that a clause in a contract imposing taxes in lieu of other taxes, or all taxes to which the stockholders would be subject, is impaired by legislation raising the rate of taxation or imposing taxes other than those specified in the charter."

Therefore, it must be held here, that, by the ordinance of January 12th, 1869, relieving the Rochester City & Brighton Railroad Company from making any new pavement, approved by the Act of the Legislature (Laws of 1869, Chap. 34), specifically providing that said railroad company should keep the surface of the streets inside of its tracks in repair, but that whenever any of said streets were permanently improved, said company should not be required to make any part or portion of such improvement, under which ordinance and enactment the railroad company continued to maintain and operate its street surface railroad, and extend its railroad into other streets and parts of streets in the city, a contract was made and entered into by and between the city and the railroad company from the provisions of which neither without the consent of the other was

at liberty to depart, so that from the time of the passage of
145 the amended ordinance in 1869, to the time of the enactment of the Law of 1884 (Laws of that year, Chapter 252), providing for the construction, extension, maintenance and operation of street surface railroads, the Rochester City & Brighton Railroad Company was required to keep and maintain the surface of its streets inside the rails of its tracks in good and thorough repair, but was not required to make or bear the expense of any part or portion of any permanent improvement of the streets in which its tracks had been laid or any extensions thereof, prior to May 6th, 1884, the date of the passage of Chapter 252 of the laws of that year.

The brief counsel for the city states that, the action is brought under the laws of 1884, "which directs that the street railway companies shall, in case of repaving or repairing pavements in the streets of cities, provide at their own expense such repaving or repairs, and in case of neglect the local authorities may themselves perform the work and call upon the railway companies for payment therefor."

That act provides, as stated in the title, for the construction and extension of street surface railroads, and its provisions regulate the manner and the terms and conditions upon which corporations may be formed for the purpose of constructing, maintaining and operating street surface railroads, and for the construction by any existing street surface railroad company of extensions of its lines or branches thereof.

"SECTION 9. Every such corporation incorporated under, or constructing, extending or operating a railroad constructed or extended under the provisions of this act, within the incorporated cities and villages of this state, shall also whenever and as required under the supervision of the proper local authorities have and keep in permanent repair the portion of every street and avenue between its tracks, the rails of its tracks and a space two feet in width out-
146 side and adjoining the outside rails of its track or tracks so long as it shall continue to use such tracks so constructed under the provisions of this act."

This provision applies, as it clearly appears from the context of the section, and also from the various provisions of the other sections of the act, to the tracks of street surface railroad companies incorporated under its provisions and to the tracks only of an extension of the line or branches of the railroad of an existing street surface railroad company. That the act was not intended to regulate the operation of the railroad of an existing street surface railroad company is expressly shown in the section providing for the regulation of fares, as follows:

"SECTION 13. No company or corporation incorporated under, or constructing and operating a railroad under the provisions of this act, shall charge any passenger more than five cents for one continuous ride from any point on its road or any road or branch operated by it or under its control, to any point thereon or on any connecting branch thereof within the limits of any incorporated city or village. This section shall not be construed to apply to any part of any road heretofore constructed and now in operation, unless such company shall acquire the right to extend such road, or to construct branches thereof under the provisions of this act, in which event its rate of fare shall not exceed its authorized rates prior to such extension."

If, however, the provision of the act can be regarded as broad enough to apply the provisions of section nine to the entire railroad of any existing street surface railroad company extending its lines under the provisions of the act, then such provisions are unconstitutional, as being violative of the existing contract between the city and the Rochester City & Brighton Railroad Company, to all the rights of which company the defendant has succeeded. (Gilmore *v.* City of Utica, 121 N. Y., 561.)

147 It is further urged in behalf of the plaintiff that, the defendant has expressly assented to the right of the city to

exact the payment now in suit, and effectually waived any claim that it might have for exemption, by assenting to the terms and conditions upon which the Common Council definitely fixed and confirmed the right of the defendant to the location of its tracks as the same stood in December, 1894, upon condition that Article 4 of the Railroad Law (which is the codification of the statute of 1884) be fully complied with by the defendant.

It may be said that such assent of the city to the location of the defendant's tracks as the same had been laid under approval and consents obtained from time to time, was a mere formality; no new or additional franchise being granted by such ratification and approval, the conditions imposed were violative of the previously existing contracts.

But the resolution of the Common Council that the provisions of Article Four of the Railway Law should be complied with, assented to by the defendant, is modified, and the rights of the parties specifically stated and determined by the subsequent provision that all of the provisions of any agreement between the City of Rochester and any street railroad company and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance or operation of street railroads within said city shall remain in full and binding force; and these resolutions shall not be construed as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company. Moreover further exactions were made by the city in requiring the defendant as long as it or its successors and assigns should operate, maintain and use its railroad in said city, to furnish free transportation on its cars to the police and firemen of the city, for which there
148 was no equivalent except the resolution of the Common Council ratifying and approving the location of the railroad and tracks of the defendant, as the same were then operated and used.

It is argued in behalf of the city that the special acts of the Legislature authorizing the municipal authorities of the city to assess upon the property of the railway company, in the same manner that assessments are made upon the property of other owners benefited by the improvement of the streets, the expense of paving between and outside the railroad tracks, is not violative of the rights of the defendant, as impairing the obligation of its contract with the city. Citing Lake St. R. R. Co. *v.* City of Chicago, 183 Ill., 75; Lincoln St. Ry. Co. *v.* City of Lincoln, 84 N. W. Rep., 802; Sterrie *v.* Houston City St. Ry. Co., L. R. A. 716; N. Y. L. E. & W. R. R. Co. *v.* City of Dunkirk, 65 Hun., 494, affirmed 143 N. Y., 659.

In Lake St. El. R. R. Co. *v.* City of Chicago, there was simply an ordinance granting authority to an elevated railroad company to maintain and operate its road, requiring it to restore and put in good condition pavements, etc., in case they were disturbed in constructing the road. It was held that the ordinance was not a contract which precluded a subsequent assessment of the company's property for the local improvement of the street, the same as any real estate contiguous to the improvement.

In Lincoln St. R. R. Co. *v.* City of Lincoln, chiefly relied upon in support of this contention, the ordinance submitted to the electors the proposition of giving their consent to the contruction and operation of a railway, provided that "said railway track shall be so constructed as to present the least practical obstruction to the ordinary public use of the streets, and that it shall when required, conform to the established grades of the streets as now or hereafter to be established, when such streets are brought to grade, and further,
149 said railway company shall be subject to all reasonable regulations in the construction and use of said railway which may be imposed by ordinance,"—held, assuming that such provisions became a part of the charter of the corporation, having the elements of a contract with respect thereto, that an exemption for assessment for the improvement of the street was not created, and the Legislature was not thereby prohibited from imposing a liability on such corporation to pave part of the street occupied by its tracks in conformity with the improvement of the remainder of the street. Held further, that a charter or grant of franchise rights to a corporation is to be construed strictly, and a claim of exemption cannot be sustained which is not in express terms granted or clearly implied from the terms of the grant.

In Storrie *v.* Houston St. Ry. Co., it was held, that an enlargement of the liability of a street railway company for paving a street is *not unconstitutional where* the company's rights were acquired subject to the constitutional provision that all privileges and franchises shall be subject to legislative control.

In N. Y. L. E. & W. R. R. Co. *v.* City of Dunkirk, it was held merely that the Legislature had absolute authority over the subject of taxation, and that as the railroad corporation was a creature of the statute, the Legislature might impose upon it burdens additional to those prescribed by its charter.

These cases in effect merely uphold the power of the Legislature to declare that the property of a street surface railway company is of a character to be substantially and directly benefited by the improvement of a street, and that in proportion as it is benefited may be assessed in common with other property upon the street.

In Covington *v.* Kentucky (173 U. S., 231), cited in sup-
150 port of the plaintiff's contention, it was held that the provision in the act of the Legislature of Kentucky of May 1, 1886, that certain reservoirs, etc., with the land on which they were situated, which the City of Covington was, by that act authorized to acquire and construct, should be and remain forever exempt from state, county and city tax, did not, in view of the provision of the prior act of February 14, 1856, that, "all charters and grants of or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent shall be therein plainly expressed," tie the hands of the Commonwealth of Kentucky, so that it could not, by legislation, withdraw such exemption and subject the property to taxation. The pith of the decision, so far as it is applicable here, is found in a single paragraph of the opinion of the Court, in which

it is said, "if that act (the act exempting the property from taxation) in any sense constituted a contract between the city and the Commonwealth, the reservation in the existing general statute of the right to amend or repeal it was itself a part of the contract."

It will be observed that here, in the statute of 1869, legalizing the amended ordinance of the Common Council, it is expressly provided without any reservation of a right to amend or repeal, that whenever any of the streets of the city should by ordinance or otherwise be permanently improved, the railroad company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof. The legislative provision is in terms the same as that of the amended ordinance which was the basis of the contract with the Rochester City & Brighton Railroad Company, all of the provisions of which were expressly ratified and confirmed upon further consideration moving from the defendant to the city, by the resolutions of the Common Council embodied in the contract made by the city with the defendant in 1894.

151 The provision for the exemption of the Rochester Railway Company from assessment upon its property or any part of the expense of the permanent improvement of any street or parts of streets of the city, on which the tracks of the company or its predecessors were laid prior to the general act of 1884, is as absolute as that in any of the authorities cited in the opinion of the Court of Appeals in the case of the Skaneateles Water Company against the Village of Skaneateles, in support of the inviolability of corporate charters respecting the power of taxation. (161 N. Y., 167.)

In the case of the State of New Jersey *v.* Wilson (7 Cranch, 164), it was held that, "a legislative act declaring that certain lands which should be purchased for the Indians should not thereafter be subject to any tax, constituted a contract which could not be rescinded by a subsequent legislative act. Such Repealing Act being void, under the clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of contracts."

In State Bank of Ohio *v.* Knoop (16 How. U. S., 369), the doctrine was applied to the provision of a general banking law, under which the plaintiff bank received its charter, requiring banks to make semi-annual dividends and set off six per cent. of such dividends for the use of the State, which sum or amount so set off should be in lieu of all taxes to which the company or the stockholders therein would otherwise be subject. This, it was held, was a legislative contract fixing the amount of taxation which could not be changed without the consent of the bank. In the course of the opinion it was said that "every valuable privilege given by the charter and which conduced to an acceptance of it, is a contract which cannot be changed by the Legislature, where the power to do so is not reserved in the charter."

152 The State having adopted a new constitution, in the case of Dodge *v.* Woolsey (18 How. U. S., 331), it was held as follows: "The fact that the state consti-ution has been changed since

the passage of the act chartering the Bank, cannot release the State from the contract contained in the charter."

In McGee *v.* Mathis (4 Wall. 143), it was held that, "where a state, in order to promote the sale and reclamation of its swamp lands, provides by legislation that such lands shall be exempt from taxation for the term of ten years, and issues transferable scrip receivable therefor, the contract arising between the state and a receiver of the scrip is impaired by a subsequent act of the Legislature repealing the exemption, although the land is not taken up and the scrip paid until after the passage of such act."

In the case of Binninger *v.* City of New York (177 N. Y., 199), towhich attention is called,the question here under consideration was not before the court or under discussion. The resolution of the Common Council of the City of Brooklyn passed in the year 1853, authorizing the Brooklyn City Railroad Company to construct and operate a street surface railroad, was without legislative sanction. It was before the general railroad law empowering cities and villages to grant franchises to street surface railroad companies to construct and operate street railways, and therefore the resolution granting the franchise was beyond the power of the Common Council and void. (Potter *v.* Collis, 156 N. Y., 16.)

In the case of the Village of Mechanicsville *v.* S. & M. Street R. Co. (35 Misc., 513, affirmed without opinion, 174 N. Y., 507), it was held that the franchise or contract given to the street railway corporation, as construed by the Court, permitted a pavement of the kind adopted by the village. Having held it to be fairly presumed that neither of the parties expected or intended that the kind of pavement mentioned and originally provided for
153 in their contract, in the changed circumstances which had arisen should be laid, it was unnecessary for the Court to go further in giving reasons for its decision.

In the Binninger case and in the Mechanicsville case, Milhau *v.* Sharp (27 N. Y., 611), in which it was held that the powers of a municipal corporation in respect to the control and regulation of the streets, are held in trust for the public benefit, and without legislative sanction cannot be abrogated or delegated to private parties, was cited and applied.

Here the authority to grant the franchise given to the railway company has not only legislative sanction by special enactment, but the terms of the grant are by contract in writing, made and executed by the parties, expressly stipulated, and afterward upon a new and valuable consideration ratified and confirmed by resolution of the Common Council, formally affirmed by the terms of the contract entered into in accordance therewith.

The case here seems to furnish the strongest possible grounds for the application of the constitutional provision prohibiting the Legislature from passing laws impairing the obligation of contracts, and therefore it must be held that the Rochester Railway Company cannot be made liable by assessment or otherwise for paving between the tracks, the rails of the tracks and two feet outside, in the streets of the city in which the Rochester City & Brighton Railroad Company

had obtained its franchise and constructed its road prior to the 6th of May, 1884.

The complaint should be dismissed.

154 Supreme Court, Appellate Division, Fourth Department.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

It is hereby stipulated that the foregoing are true copies of the summons, complaint, answer, case and exceptions, findings, exceptions thereto, and notice of appeal in the above entitled action now on file in the Monroe County Clerk's Office, and of the whole thereof.

W. W. WEBB,
Corporation Counsel, Attorney for Appellant.
SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Respondent.

155 At a Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Fourth Judicial Department, at the City of Rochester, commencing on the 15th day of November, 1904.

Present: Honorable Peter B. McLennan, Presiding Justice; Honorable Alfred Spring, Honorable Pardon C. Williams, Honorable Frank H. Hiscock, Honorable Martin L. Stover, Associate Justices.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

Order of Affirmance on Appeal From Judgment and Order.

The above named The City of Rochester, the plaintiff in this action, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court, and entered in the office of the Clerk of the County of Monroe on the 18th day of April, 1904, and from an order made by said Court, denying a motion for a new trial, and entered same day, and the said appeal having been argued by Mr. W. W. Webb, of Counsel for the Appellant, and Mr. Charles J. Bissell, of Counsel for the respondent, and due deliberation having been had thereon,

156 It is hereby ordered and adjudged that the judgment and order so appealed from be and the same are hereby affirmed; and the respondent recover of the appellant the costs of this appeal, on opinion of Nash, J., delivered at Special Term. All concur.

NEWELL C. FULTON, *Clerk.*

Supreme Court, Monroe County.

CITY OF ROCHESTER
against
ROCHESTER RAILWAY COMPANY.

The above entitled action having been tried at a Trial Term of the Supreme Court, held at the Court House in the City of Rochester, in and for the County of Monroe, for the month of December, 1903, and the Court having duly made and filed its decision, and judgment thereupon having been entered in the office of the Clerk of the County of Monroe on the 18th day of April, 1904, dismissing the complaint upon the merits and for one thousand ninety-seven dollars and five cents ($1,097.05) costs in favor of the defendant and against the plaintiff.

And the plaintiff having duly appealed from such judgment to the Appellate Division of the Supreme Court in the Fourth Judicial Department, and such appeal having come on to be heard and having been duly argued, and the Court having duly made a decision and order unanimously affirming the judgment, so appealed from, in all things, and directing a judgment of affirmance, and a certified copy of such order, together with the remittitur from the
157 Appellate Division, having been duly filed in the office of the Clerk of the County of Monroe,

Now, on motion of Satterlee, Bissell, Taylor & French, attorneys for the defendant,

Ordered and Adjudged and this Court hereby does order and adjudge that the judgment so as aforesaid appealed from by the plaintiff be, and the same hereby is, in all things unanimously affirmed.

And it is further Ordered and Adjudged, that the defendant recover from the plaintiff the sum of one hundred sixty-two dollars and sixty-two cents, for its costs and disbursements upon such appeal, as taxed by the clerk.

JAMES L. HOTCHKISS, *Clerk.*

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

GENTLEMEN: Please take notice that The City of Rochester, the plaintiff in the above entitled action, hereby appeals to the Court of Appeals from the judgment of the Supreme Court entered herein in the Clerk's office of the County of Monroe on the 6th day of December, 1904, pursuant to an order of the Appellate Division, Fourth Department, affirming with $162.62 costs a judgment previously entered herein in the Clerk's office of the County of Monroe on the 15th day of April, 1904, dismissing the complaint herein upon the

merits, with $1,097.05 costs, and from the whole of said
158 judgment of affirmance.

Dated, Rochester, N. Y., December 6, 1904.

Yours, etc.,
W. W. WEBB,
Corporation Counsel, Attorney for Plaintiff,
46 *City Hall, Rochester, N. Y.*

To Satterlee, Bissell, Taylor & French, Attorneys for Defendant, and to the Clerk of the County of Monroe.

STATE OF NEW YORK:

In Court of Appeals.

THE CITY OF ROCHESTER, Appellant,
against
ROCHESTER RAILWAY COMPANY, Respondent.

It is hereby stipulated that the foregoing are true copies of the summons, complaint, answer, case and exceptions, findings, exceptions thereto, judgment, notice of appeal to Appellate Division, order of Appellate Division, Judgment of Affirmance, and notice of appeal to the Court of Appeals in the above entitled action, now on file in the Monroe County Clerk's office, and of the whole thereof.

W. W. WEBB,
Corporation Counsel, Attorney for Appellant.
SATTERLEE, BISSELL, TAYLOR & FRENCH,
Attorneys for Respondent.

(Endorsed:) Filed November 6th, 1905.

159 STATE OF NEW YORK:

Court of Appeals.

CLERK'S OFFICE.

I, W. H. Shankland, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of opinions in the action entitled: "The City of Rochester, Appellant, *vs.* Rochester Railway Company, Respondent," with the originals on file in the office of the State Reporter and that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto set my hand and affixed my official seal, at the City of Albany, this twenty-third day of October, A. D., 1905

[Seal of the Court of Appeals of the State of New York.]

W. H. SHANKLAND, *Clerk.*

160 *Opinion of the Court, per Cullen, Ch. J.*

CULLEN, *Ch. J.*:

I concur in the view of Judge Gray that this defendant cannot in any way be foreclosed by our decision in the action of Conway *v.* City of Rochester (157 N. Y. 33) (an action to which it was not a party), from asserting that the immunity from contributions to the expense of new pavements in the city of Rochester, enacted by chapter 34 of the Laws of 1869, was a contract right of which it could not be deprived by subsequent legislation. On the merits, however, I am of opinion, first, that the statute mentioned did not constitute a contract between the state and the railroad company; second, that if it did, the exemption granted by the statute was personal to the defendant's predecessor in title and has not passed to it.

I assume that the provision of the General Railroad Law (section 98) requiring street surface railroad companies to pay the cost of paving between their tracks and for two feet outside thereof is an exercise of the taxing power (Sioux City St. Ry. Co. *v.* Sioux City, 138 U. S. 98; Wooster *v.* Wooster St. Ry. Co., 196 U. S. 539), though if an exercise of the police power the result would be the same. The statute of 1869 (sec. 5) enacted that the defendant's predecessor should put, keep and maintain the surface of the street inside the rails of its tracks in thorough repair, but whenever any of said streets was by ordinance permanently improved said company should not be
161 required to bear any part or portion of such improvement or of the expense thereof, but should make its rails conform to the grade of the street. This certainly did exempt the company from any expense of repavement so long as the statute remained in force, but the question is, did the statute confer upon the company any contract right immune from subsequent recall or was it the mere exercise by the legislature of the taxing power, which could at any time be changed, modified or repealed? To determine this question it is necessary to consider the condition of the parties when the statute was enacted and in that consideration to keep constantly in view the well-settled rule for the construction of statutory exemptions from taxation as declared by the Supreme Court of the United States in a long and unbroken line of decisions. In Yazoo, etc., Ry. Co. *v.* Adams (180 U. S. 1) it is said: "Exemptions from taxation are not favored by law, and will not be sustained unless such clearly appears to have been the intent of the legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons; and while, as we have held in many cases, legislatures may, in the interest of the public, contract for the exemption of other property, such contract should receive a strict interpretation and every reasonable doubt be resolved in favor of the taxing power. Indeed, it is not too much to say that courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended, or that they have become

inoperative by changes in the original constitution of the companies." (See cases there cited, particularly New Orleans City R. R. Co. *v.* New Orleans, 143 U. S. 192, and Memphis Gas Light Co. *v.* Shelby Co., 109 U. S. 398.)

In 1862 the Rochester City & Brighton Railroad Company was incorporated under the General Railroad Act of 1850 (Ch. 140) for the purpose of operating a street railroad on certain streets
162 in the city of Rochester extending into an adjoining town. That statute authorized the incorporation under it of street surface railroad companies. (Matter of Washington St. A. & P. R. R. Co., 115 N. Y. 442.) This proposition was never questioned till the decision of this court in Matter of New York Cable Company *v.* Mayor, etc., of N. Y. (104 N. Y. 1), and, in fact, most of such companies outside of the old city of New York were organized under that statute. Whatever doubts were cast on the application of the General Railroad Act to street railroads by the opinion in the Cable Company case were removed by the decision in the Washington Street case, where the remarks in the earlier case were expressly retracted. By the General Railroad Act plenary power was given to any railroad company incorporated under it to lay out and construct its road between the termini mentioned in the articles of association, except that subdivision 5 of section 28 provided that the statute should not be construed to authorize the construction of any railroad upon, along or across any streets in any city without the assent of the corporation of the city. It was, therefore, necessary for the construction of any street railroad within a city that the company should obtain the consent of the city to the use of the street. The city of Rochester by an ordinance consented to the construction of the proposed railroad. It exacted by that ordinance compliance with the terms and conditions which appear in Judge Gray's opinion. The road was built, the company failed and its road and franchise were sold in 1868 under a foreclosure, the purchaser at which conveyed to a new company, bearing the same name, also organized under the general statute of 1850. In 1869 the new company represented to the common council that the terms of the ordinance under which the road was built and being operated were too onerous and asked for relief. Thereupon the common council passed a new ordinance, the most material points of which were that the fare for children was fixed at three cents, and the company was relieved for the term of five years from its obligation to contribute to
163 the expense of the repavement or improvements of the streets, though it was required to keep the space between its tracks and one foot additional on each side in good repair. Both parties sought the action of the legislature and the statute of 1869 was passed. Now, let us see what were the rights of the parties at the time of the enactment of this statute. The company had, by the construction of the railroad by its predecessor, under the consent of the common council, and its own purchase on the foreclosure, acquired a valid franchise to operate its railroad. It is not necessary to determine what was the effect of the conditions attached by the city of Rochester to its consent. If there was no authority to impose those

conditions, nevertheless the consent was effective and the franchise valid. (Matter of Kings Co. El. R.R.Co., 105 N. Y. 97.) On the other hand, it is equally clear that under the power given by the General Railroad Act to the municipality to consent to the construction of such a road, the municipality could in no degree contract away or limit the taxing power or the police power possessed by the legislature. (People *ex rel.* Met. St. Ry. Co. *v.* Tax Comrs., 174 N. Y. 417; Sioux City St. Ry. Co. *v.* Sioux City, *supra.* See also, Wooster St. Ry. Co. *v.* Wooster, *supra.*) The rights and immunities, therefore, of the company at that time must be determined by the provisions of the act of 1850, which gave no exemption from the future exercise by the legislature of either power. In the exercise of the police power the legislature could prescribe the maximum fares to be charged by the company (Buffalo E. S. R. R. Co. *v.* B. S. R. R. Co., 111 N. Y. 132; Railroad Commission Cases, 116 U. S. 307; Norfolk & Western R. R. Co. *v.* Pendelton, 156 U. S. 667), and such right was reserved by section 23 of the statute subject to the qualification that the fare should not be reduced so that the net returns to the company should be less than ten per cent. on the sum actually invested. So equally in the exercise of the taxing power it could relieve the company from the burden of any provisions imposed on it by the ordinance of the common council in 1862. Wooster Ry. Co. *v.*
164 Wooster, *supra.*) Neither of these powers was necessarily to be exercised once for all. Unless contracted away the right to their exercise was continuous and statutes passed under them could be varied or altered from time to time. The statute does not assume to ratify or authorize any contract between the railroad company and the common council of the city. It does not recite that application has been made to the legislature by either party for its adoption. It merely enacts what the legislature was empowered to enact, whether with or without the consent of either or of both parties. Indeed, it would seem a conclusive objection to considering the statute as ratifying any contract of the common council that the ordinance of the common council gave the railroad company immunity from contribution to the expense of improvement of the street only for five years, a term long since expired, while that enacted in the statute is not limited in duration. The statute *did not* grant the franchise; that had been already acquired. Nor does the record disclose even a suggestion that there was entertained any question as to its validity. It is settled by authority that an exemption from taxation or regulation of charges granted by statute to be irrevocable must be based on a consideration; when a mere gratuity or privilege it may be recalled at any time. (Christ Church Hospital *v.* County of Philadelphia, 24 How. [U. S.] 301; Tucker *v.* Ferguson, 22 Wall. 527.) When such exemptions are granted in the charter of a corporation then the acceptance of the charter is assumed to be the consideration for the grant of the exemption. (Home of Friendless *v.* Rouse, 8 Wall. 430.) But the act of 1869 neither amends nor assumes to amend the charter of the company, and if it did it would be subject to the constitutional reservation of amendment or repeal. The true test of whether there was any consideration for the ex-

emption granted by the statute is whether any acceptance of its terms and provisions was necessary to make it effectual. If not, how can it be said that the exemption is other than a privilege? Here lies the distinction between this case and that of New Jersey *v.* Yard
165 (95 U. S. 104). In the case cited the statute of New Jersey required the written acceptance of its terms by the company or else it became wholly inoperative. It is to be further noticed that there was no provision in the New Jersey Constitution similar to that in ours, which reserved the unqualified right to alter or repeal charters, and the decision proceeded in part on this last ground. It is also settled that neither corporations nor individuals have a vested right that the law shall continue to be unchanged. Had, in 1869, instead of the special statute, a general law been passed exempting railroad companies from contribution towards the cost of repaving the streets, it is clear that such law might have been thereafter repealed, and there might be imposed on the company a reasonable and proper tax for the improvement. (Pennsylvania R. R. Co. *v.* Miller, 132 U. S. 75.) Now, how does it differ that instead of a general statute a special law was enacted? In my opinion it only goes to the intent of the legislature. If I am right in the position that the legislature could have enacted the statute of 1869, so far as its provisions are under examination here, without any assent from the railroad company, then had the act concluded, "this statute is passed in the exercise of the powers of taxation and police and not as a grant," it could not well be contended that the railroad company acquired thereby any contract or property right. I imagine that a continuous power vested in the legislature may be exercised and its exercise recalled or modified as well by special legislation as by general legislation if no provision of the State Constitution forbids, which was the case in 1869. If to-day a statute were passed repealing section 98 of the present General Railroad Law and enacting that street railroad companies shall not be compelled to pay any portion of the expense of paving the streets within their tracks, will it be denied that subsequently the legislature might change that policy and impose on the companies a burden of which it had previously relieved them? If this be so, why equally may not the legislature relieve to-day a particular railroad company from that burden and next year reimpose the burden upon it? The
166 only difference that I can see between the two cases is that in the case of a statute applicable to a particular corporation, when that statute gives the charter an intent to grant away, the right to tax may be implied, which would not be implied in the case of general legislation. But if the question comes to one merely of intent, then the rule already quoted, "that courts are astute to seize upon evidence tending to show that either such exemptions were not originally intended or that they have become inoperative," should be decisive of the question.

I am further of the opinion that any right to exemption from the cost of paving the streets, which may have been held by the Rochester City & Brighton Railroad Company, was personal and did not pass to this defendant. This has been so held in a number of de-

cisions by the Supreme Court of the United States. (Shields *v.* Ohio, 95 U. S. 319; Railroad Co. *v.* Maine, 96 U. S. 499; Railroad Company *v.* Georgia, 98 U. S. 359; Norfolk & Western R. R. Co. *v.* Pendleton, 156 U. S. 667; Yazoo *v.* Adams, 180 U. S. 1; Morgan *v.* Louisiana, 93 U. S. 217; Wilson *v.* Gaines, 103 U. S. 417; Chesapeake & Ohio R. R. Co. *v.* Miller, 114 U. S. 176; Tucker *v.* Ferguson, 22 Wall. 527.) In the Norfolk & Western Railroad case it was said: "We have frequently held that, in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchise of the first grantee; * * * this we have stated to be a salutary rule of interpretation, founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant construed *strictissimi juris.*" That privilege is not at all similar to such franchises as the right to construct and operate a railroad, to lay gas mains and supply gas, and to maintain a ferry. Those franchises when granted become
167 property similar in their general attributes to other property. The grant of such a franchise, even without consideration, is, unless a right to revoke is reserved, as effectual to vest an indefeasible title in the grantee as a voluntary conveyance of a piece of land. Not so, however, as to an exemption from taxation or from the exercise of the police power. It is property only when granted on a consideration and if granted without consideration may be recalled. (See cases cited *supra.*) Doubtless such exemptions if attached to property itself would increase its value, but because they are against common right they will be construed to be personal and limited to the grantee unless a contrary intention clearly appears. The language of the statute before us is personal, not attached to the property. It enacts that "said company," not "said company, its successors or assigns," shall not be required to bear any part of the expense of repaving the streets.

The other questions presented on this appeal are disposed of by our decision in the Conway Case (*supra*) and therefore, do not require examination.

I vote for reversal of the judgments below and for the granting of a new trial, costs to abide event.

GRAY, *J.* (dissenting):

I am of the opinion that the transactions in 1869 between the defendant, the city and the state resulted in a valid contract, of which chapter 34 of the Laws of 1869 was the complete expression and final sanction, and that it was beyond the power of the legislature to impair its obligations by subsequent legislation. Neither the provisions of the General Railroad Act of 1884, nor those of the Railroad Law of 1890, could avail to recall, or to modify, the grant of the right of exemption from the burdens of future assessments for im-

proving the streets of the city of Rochester. As a vested right under the contract, it was within the protection of the State and Federal Constitutions. For 28 years the city observed this contract and, upon two occasions, by ordinances, recognized the right it had conferred. It forbore to request, or to require of, the Rochester
168 City & Brighton Railroad Company, or the defendant, that either should bear any portion of the expenses of street improvements in streets, where tracks have been laid prior to 1884, and, doubtless, would have continued to maintain that attitude of respect for its agreement, had not our decision in the case of Conway *v.* City of Rochester, (157 N. Y. 33), been regarded as warranting a different view of the relations established by the resolution and legislation of 1869. I think, too, that a precise consideration of the General Railroad Act of 1884, under which the defendant was incorporated and upon whose provisions the plaintiff's claim is, mainly, rested, aids in the conclusion that it was not necessarily applicable, in the respect we are considering, to a street railroad company, whose street franchises and construction antedated 1884.

The decision in the Conway case, in 1898, could not affect what rights were possessed by the defendant based upon the legislation of 1869; for it was not a party to, nor represented in, that action. In that case, the plaintiff, an abutting owner upon a street in which the Rochester Railway Company was operating its road, sought to prevent the city of Rochester from awarding any contract for the pavement of the street, until it had required the company to do the paving within, and two feet outside of, its tracks, under the provisions of section 98 of the Railroad Law. The questions certified to this court in that case were whether the plaintiff and the other abutting owners were assessable for the cost of that portion of the new pavement; or whether the municipal authorities were not obliged to require the railway company to do that much of the proposed work. It is true that the act of 1869 was relied upon, in the argument for the city, as exempting the company; but it was not discussed in the opinion. What we considered and determined was the nature of the statutory direction to the local authorities, with respect to a street railway company, when they exercised their power to repave a street, within which it was in operation. We held it to be mandatory upon them to require the company to do the particular portion of the work specified in the statute and the argu-
169 ment based upon the case of Gilmore *v.* City of Utica, (121 N. Y. 561), was answered by pointing out that there the statute was permissive and left it discretionary with the municipal authorities to require the street railway company to bear a portion of the expense of the repaving. The contractual status of the defendant and the city, if at all in mind, was not shown, as it has been here; otherwise than as the act of 1869 might be deemed to disclose it. What the defendant might claim and establish for itself was not before us. There was no complaint of an unconstitutional invasion of any contract right in the application of the General Railroad Acts and when the objection of the unconstitutionality of a law is not

raised by a party, who has the right to make it, the court will not raise it. (People *v.* B., F. & C. I. Ry. Co., 89 N. Y. 75, 92.) That the defendant might invoke the constitutional guarantees, when it was sought to deprive it of the enjoyment of a right secured by contract, or that it might waive them, was not a matter of assumption for the court.

That there existed the essentials to a valid contract, I regard as clear upon the facts. There was nothing to take it out of the application of those legal principles, which govern transactions between persons. The grant of a right to execute the corporate purpose was made upon the agreement of the grantee to comply with certain conditions. A consideration moved each party to the transaction and there was performance. The situation is to be considered, which existed at the time when the convention between the defendant's predecessor in interest, the Rochester City & Brighton Railroad Company, and the city of Rochester was reached; as well as what was then agreed upon between them, and, eventually, sanctioned by the act of 1869. The Rochester City & Brighton Railroad Company was organized, in 1862, under the General Railroad Act of 1850, as a horse railroad company. The act of 1854 had been passed, (Chap. 140, Laws of 1854), to regulate the construction of railroads in cities; but its application, by its terms, was to such as com-
170 menced and ended within the city. The company constructed and operated a railroad between points on either side of the city of Rochester; passing to them through the streets of the city. Upon its incorporation, the common council of the city gave its consent by resolution, as required by the act of 1850, to the construction of a street surface railroad upon the routes in the city designated, with various stipulations and conditions. One of them required that the company should improve with suitable materials, as might be required by the common council, within its tracks and for two feet and four inches outside thereof, and that it should keep so much of the surface of the street in good repair. It authorized the company to collect a fare of five cents from every person; except children under five years of age, who should ride free. This resolution, being accepted and acted upon, undoubtedly, constituted a valid contract between the company and the city, so far as the consent was given to construction and operation; just as there would have been a contract had the incorporation been one under the act of 1854. (People *v.* Sturtevant, 9 N. Y. 273; Milhau *v.* Sharp, 27 *ib.* 611, 620; Potter *v.* Collis, 156 *ib.* 16.) But that the common council could do more than consent and that it could confer rights and make stipulations, in the absence of other legislative authority, was, at least, doubtful. In that situation of affairs, however the status of contract may be regarded, the company, in 1868, failed and its franchises and properties came, through a foreclosure sale, into the possession of a successor bearing the same name. Then it was that negotiations with the city to be relieved of the onerous conditions of the resolution of 1862 resulted in an amendatory ordinance; by which the company was only required to lay its tracks even with the surface of the streets and to put the surface of the

streets, inside the rails and for one foot outside thereof, in good and thorough repair, under the direction of the committee of the common council. It was provided that, thereafter, it should keep the streets in good repair inside its tracks and between the rails during the term of five years, and that it should be exempt, for that
171 period of time, from any part of the expense of a new, or permanent, street improvement. Another requirement of the original ordinance was amended, so as to reduce the fare for children between twelve and five years of age to three cents. Both parties, however, subsequently united in the submission to the legislature of a proposed law, legalizing the action of the common council, and the passage of chapter 34 of the Laws of 1869, in question, was the result. This act empowered the company to maintain and operate a railroad in all of the city streets, in which it had a track, or which the municipal authorities might permit it to enter upon. It authorized the collection of a fare of five cents from a passenger over twelve years of age, reduced the fare of a passenger between twelve and five years of age to three cents and provided that children under five might ride free. It required the company to "put, keep and maintain the surface of the streets inside the rails of its tracks, in good and thorough repair, under the direction of the committee of the common council," and exempted it from making, or bearing any part of the expense of, permanent street improvement, beyond conforming its rails to the grade. This act was an express grant of a franchise and it removed what doubt may have existed as to the company's legal status; or as to its rights and powers under the General Railroad Act of 1850, or under the resolution of the common council. It was a grant upon conditions; which was accepted and acted upon by the extension of the company's railroad into other streets, with the expenditure of large sums of money. It was more than a mere validation of the municipal ordinance; which was merged in the comprehensive and higher legislative enactment. There was a compact with the state, to which the city had assented; whereby franchises and powers were conferred upon the corporation, as of original grant. The corporation was obliged to carry passengers between twelve and five years of age for three cents, instead of five; it was to keep the surface of the streets inside the rails of its track, in good and thorough repair, without limitation of time
172 and it was exempted from the burden of the expense of future street pavements. There was no reservation of any right to alter the conditions, or to repeal the grant of an exemption, and no such right existed under the Constitution, or in the statutes of the state; for whatever reservation of powers was contained therein related to the alteration, or repeal, of general laws, or of special acts, passed for the formation of corporations; to the alteration and repeal of charters; or to the annulment and dissolution of corporations. (Constitution, art. VIII, sec. 1; R. S. chap. 18, title 3, sec. 8; chap. 140, Laws of 1850, sec. 48.) Such reservations of power did not touch the case of a contract right, which had become property. (People *v.* O'Brien, 111 N. Y. 1, 44; Albany Northern R. R. Co. *v.* Brownell, 24 *ib.* 345.) This contract, therefore, was not subject to

recall, or to modification. The covenant was implied on the part of the government not to invade the rights vested and on the part of the grantee to execute the duties and conditions prescribed in the grant. The government could not do any act to impair the grant without breach of the contract. (3 Kent, 458; Dartmouth College Case, 4 Wheat. 519; People *v.* Sturtevant, 9 N. Y. 273.) The city and the railroad company regarded this legislation as constituting a contract, inviolable in its provisions, and gave practical construction to it from 1869 to 1897. The company extended its operations and it and the defendant, as its successor in interest, have performed what was required of them; while the city never questioned the company's right of exemption from the burden of the expense of permanent street improvements, until compelled thereto by the action of abutting property owners. Nor was the provision of the act of 1869 in the nature of a gratuitous exemption from taxation, as it is argued. The company was not relieved from taxation; it was relieved of an obligation, with which its grant from the city had been burdened, in consideration of its agreement, during its corporate existence, to do the things required of it by the act. It was not "a mere continuing gratuity, which the Legislature was at liberty to terminate and withdraw at any time;" as the legislative en-
173 actment was termed in Stanislaus Co. *v.* San Joaquin, etc., Co., (192 U. S. 201). If it were merely that, there would be lacking the contractual essential of consideration. In return for the grant of the franchise by the state, the defendant agreed to charge a lesser rate of fare than before authorized for its passengers under the age of twelve, and to *permanently* keep the street surface in good repair. The public was the gainer by the provisions of the act, in those respects, as in the encouragement given to the extension by the company of its railroad tracks throughout the city. In view of the protest and negotiations of the reorganized company for a less onerous franchise; the resolution of the common council assenting to a modification, upon conditions to be accepted by the company; the legislative enactment, ratifying the action of the city and conferring, directly, a franchise and an exemption from the previous burden attaching to its right to operate its road, and the action of the company in accepting the new rights and powers and in expending large sums of money in reliance thereupon, the argument that there was no contract, founded upon a consideration and beyond the power of the legislature to affect, or to recall, seems quite untenable. The doctrine of the cases of Binninger *v.* City of New York, (177 N. Y. 199), and of Village of Mechanic-ville *v.* S. & M. Street Ry Co., (174 *ib.* 507), has no application. In those cases, the question was one of the power of the municipalities, from which the railroad companies had received grants of rights upon conditions as to the kind of pavement to be laid within and outside of their tracks, to require the laying of a different pavement. In the Binninger case, the grant, or contract, relied upon was questionable, because without the sanction of the legislature, (having been made in 1853), and the decision went upon the ground that it was charter

legislation. In the second case, the decision below, which was affirmed here without opinion, held, substantially, that the condition of the franchise was of a nature that required the pavement to be such "as made a good condition," or of the kind adopted by
174 the village. In neither case was there the legislative sanction of the contract, under which the railroad company derived rights; nor was the question now before us raised.

There being, therefore, a valid contract with the city, which was confirmed by the state in a legislative enactment, of itself conferring upon the company its franchises and rights and an exemption from the burden of the expense of future permanent street improvements, upon the consideration of acts to be performed by the railroad company, this defendant, in February, 1890, succeeded, by lease, to its properties, rights, privileges and franchises "without change, or diminution, as they were before held and enjoyed," by virtue of the provisions of the statute authorizing the leasing. (Chap. 503, Laws of 1879, sec. 1.) The defendant, thereupon, proceeded to reconstruct its entire railroad for operation by electric power, or the "trolley system," instead of by horse-power; permission for which had been granted by the municipal authorities to the defendant's lessor and by the state railroad commissioners to the defendant, and there were expended four millions of dollars in the work. It was expressly found, upon the evidence, that this expenditure was made in reliance upon the provisions of the act of 1869 and upon the agreement with the city, relating to the right to change the motive power. The agreement referred to had been made just prior to the lease and provided, *inter alia*, for the company's compliance with ordinances relating to "the *general repairs* of the streets within and for two feet outside and adjoining the company's tracks." But repairs, it is to be observed, only, had been required by the act of 1869.

The contractual rights vested in the Rochester City & Brighton Railroad Company through the act of 1869 were property, of which the defendant became possessed; and it was not competent for the legislature to affect, or to impair, them. The contract existed, which the legislature had validated and re-enacted, and it was within the protection of the Federal and State Constitutions. There was neither an express, nor an implied, right reserved to the state
175 to alter, or to repeal, it. The obligation upon the city to observe the provision for exemption as to future expenses of street improvements was as permanent and unalterable, as was the obligation upon the company, during its corporate life, to carry passengers between certain ages for a reduced fare and to keep the street surface within its tracks in thorough repair. The discussion by the United States Supreme Court, in the cases of New Jersey *v.* Yard, (95 U. S. 104), and of Stearns *v.* Minnesota, (179 *ib.* 223), is much in point upon the power of the legislature of a state to alter, or to repeal, contracts created by legislative enactments and granting exemptions in consideration of the performance of some obligation imposed upon the grantee.

The General Railroad Act of 1884, under which the defendant was

incorporated, should not be construed as applying to existing railroad systems, whose tracks were constructed prior to 1884, and its plain provisions do not require such a construction. Although organized under the act of 1884, the defendant took over the franchises and rights of its lessor, as they were previously enjoyed, and operated the railroad property by right thereof and not under its act of incorporation. In so far as its lessor had constructed extensions of its tracks, under consents obtained from the municipal authorities, *after* the passage of the general act of 1884, to that extent, the provisions of that act would control in their operation. But, as to previously constructed tracks, their operation would be within the provisions of the legislative contract of 1869. It may be observed that the requirement of section 9 of the act of 1884, as to a corporation construing, extending, or operating, a railroad constructed, or extended, under the provisions of the act, is to "have and keep in *permanent* repair the portion of every street" etc.; which would be, indeed, but the obligation resting upon the defendant, as lessee, and would impose no greater burden, apparently. But section 18 of the act expressly provides that nothing therein "shall interfere with, or repeal, or invalidate, any rights heretofore acquired under the laws of this state by any horse railroad company, or affect, or repeal, any right of any existing street surface railroad company to * * * operate * * * its road in accordance with the terms and provisions of its charter" etc. The consents, under which the extensions were granted to the defendant's lessor, were upon the condition, as required by the act to be expressed, in such a case, "that the provisions of chapter 252 of the laws of 1884 *pertinent thereto* shall be complied with," and those granted to the defendant since the lease were upon the condition "that the provisions of Article IV of the Railroad Law *pertinent thereto* shall be complied with." That new extensions of tracks and the operation of the railroad franchise therewith should bring the corporation within the government of the provisions of the General Railroad Acts is not unreasonable and I do not understand the defendant to raise any question as to that.

176

As to the Railroad Law of 1890, and its amendments, we must assume, in view of our decision in the *Conway Case*, (*supra*), that section 90, in making its provisions applicable "to every corporation, which under the provisions thereof, or of any other law, has constructed, or shall construct or operate, etc., a street surface railroad" etc., is unconstitutional and void as to the defendant. The argument is that the defendant has waived, or "contracted away," any claim to exemption, in extending its railroad into various streets under consents, which are so conditioned as to require compliance with the provisions of article 4 of the Railroad Law, and in the proceedings for the confirmation of the location of its tracks. With respect to the defendant's extensions of its railroad under the Railroad Law of 1890, I am of the opinion that it is entitled to insist upon the limitation that only such of the provisions of article IV apply as, in the language of the statute, are "pertinent thereto" and that the provision as to street repairs, if more is required of the company than

it is already obliged to do, is not pertinent as to tracks laid under franchises, prior to 1884; because of the exemption contained in the act of 1869. Furthermore, I think that the defendant's undertaking, in obtaining, and in carrying out, the extensions of its road, should be regarded as having relation only to so much of the rail-
177 road system, as was constructed and put into operation after the passage of the General Act of 1884, and not as an agreement to waive what benefit, or privilege, had been secured through the act of 1869 to its lessor. There were no words of waiver and there is nothing to justify an implication of such. What the defendant applied for was the franchise to extend an existing road into other streets and the consents had reference to such extensions, and the terms upon which they were given brought the operation of such new tracks within the requirements of the General Railroad Law.

As to the proceedings for the confirmation by the municipal authorities of the location of the tracks of the companies, under whose franchises the defendant was operating, I am unable to find any agreement to waive the protection of the Constitution as to any right secured by the act of 1869. The defendant's petition set forth the lack of formality in fixing the location of the tracks in the streets, notwithstanding that the rights had been granted and that the consents of the property owners had been obtained, and a formal resolution of ratification and approval was prayed for. The common council passed an ordinance directing a contract to be prepared, containing the terms upon which the prayer of the petition would be granted, which was to be executed by both parties. The contract, as drawn and executed, ratified the location of the railroad as then operated and stated the conditions to be observed. They were, in brief, that the provisions of article IV of the Railroad Law should be complied with; that the company should furnish transportation to two policemen at a time upon each car and should issue tickets to detectives, and that it should furnish like transportation to two firemen on each car. It was then, finally, provided by a clause of the contract that "all the provisions of any agreement between the city of Rochester and any street railroad company and all ordinances, resolutions, grants and consents heretofore passed by said city, with reference to the construction, maintenance, or operation of street railroads within said city, shall remain in full and binding
178 force and these resolutions shall not be construed as * * * repealing, modifying, or changing in any respect, the terms or provisions of any agreement previously entered into between said city and any street railroad company." There appear to be two sufficient answers to the claim of the plaintiff that by this agreement the defendant had "contracted away" the right to exemption conferred by the act of 1869. The provision for compliance with article IV of the Railroad Law was but the formal insertion of a condition, which the Railroad Law required to be inserted in grants, consents, or franchises, and it is qualified, as a general provision, by the final and saving clause of the contract. This was but a simple contract between the parties, which had for its purpose the settlement of any question about the actual location of the tracks in the streets. The city was

asked for no franchise, nor did it grant any. The franchises existed and were being lawfully operated by the defendant. The contract, while desired by the defendant to prevent any question as to the proper location of its tracks, obtained for the city the right to have members of its police and fire departments carried free. But the final clause clearly operated to preserve whatever contractual rights the defendant had become possessed of under the lease, and it expressly provided that the resolution should not be considered as repealing, or changing, any agreement previously entered into. There would appear to be little if any reason for the insertion of this saving clause, unless to qualify the broad application of the provisions of article IV of the Railroad Law.

Without further discussion of the questions, I think enough has been said to show that the defendant is entitled to insist upon the right to be exempted from the burden of the expense of any new, or permanent, improvements in streets, wherein tracks were constructed and operated under franchises prior to 1884. I, therefore, advise the affirmance of the judgment.

Haight, Vann and Werner, JJ., concur with Cullen, Ch. J.; O'Brien and Bartlett, JJ., concur with Gray, J.

Judgment reversed, etc.

A true copy.

E. A. BEDELL,
State Reporter.

179 (Endorsed:) Filed November 6th, 1905, in Monroe County clerk's office.

180 At a Special Term of the Supreme Court held at the Court House in the City of Rochester, in and for the County of Monroe, on the 3rd day of November, 1905.

Present: Hon. Nathaniel Foote, Justice.

Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

A judgment having heretofore and on the 18th day of April, 1904, been entered in the above entitled action in the Monroe County Clerk's Office dismissing the complaint herein upon the merits, with $1,097.50 costs, in favor of the above named defendant and against the above named plaintiff; and the plaintiff having appealed therefrom to the Appellate Division of the Supreme Court, Fourth Department, and said judgment having been affirmed, and a judgment having been entered in this action in the Monroe County Clerk's Office on the 6th day of December, 1904, affirming said judgment appealed from, with $162.62 costs in favor of the above named defendant and against the above named plaintiff; and the plaintiff having thereupon appealed to the Court of Appeals, and said appeal

having been argued before that court, and said Court of Appeals having sent hither its remittitur in which it is ordered that the said judgment appealed from be reversed, and that the Supreme Court award final judgment in favor of the above named plaintiff and against the above named defendant for the amount claimed
181 in the complaint herein, together with interest and costs,—

Now, upon reading and filing the remittitur of the Court of Appeals in the above entitled action, and upon motion of William W. Webb, Corporation Counsel, attorney for plaintiff, it is

Ordered, that the order and judgment of the Court of Appeals in the above entitled action be, and the same hereby is, made the order and judgment of this Court, and judgment is directed to be entered accordingly.

JAMES L. HOTCHKISS, *Clerk.*

182 Supreme Court, Monroe County.

THE CITY OF ROCHESTER, Plaintiff,
against
ROCHESTER RAILWAY COMPANY, Defendant.

A judgment having heretofore and on the 18th day of April, 1904, been entered in the above entitled action in the Monroe County Clerk's Office, dismissing the complaint herein upon the merits with one thousand ninety-seven dollars and fifty cents ($1,097.50) costs in favor of the above named defendant and against the above named plaintiff; and the plaintiff having appealed therefrom to the Appellate Divison of the Supreme Court, Fourth Department, and said judgment having been affirmed and judgment having been entered in this action in the Monroe County Clerk's office on the 6th day of December, 1904, affirming said judgment appealed from, with one hundred sixty-two dollars and sixty-two cents, ($162.62) costs in favor of the above named defendant and against the above named plaintiff; and the plaintiff having thereupon appealed to the Court of Appeals, and said appeal having been argued before that court, and said court having sent hither its remitfitur in which it is ordered that the order appealed from be reversed and that the Supreme Court award final judgment in favor of the above named plaintiff and against the above named defendant for the amount claimed in the complaint herein together with interest and costs; and an order having been made herein at a special term of the Supreme Court held at the Court House in the City of Rochester, in and for the County of Monroe, on the 3rd day of November, 1905, making the judgment and order of the Court of Appeals in this action the judgment and order of the Supreme Court herein, and directing that judgment be entered in accordance with the terms hereof.

183 Now, upon motion of William W. Webb, Corporation Counsel, attorney for plaintiff, it is

Ordered and adjudged, that the judgment entered herein in the office of the Clerk of the County of Monroe on the 18th day of April, 1904, dismissing the complaint herein upon the merits with $1,-

097.50 costs in favor of the defendant and against the plaintiff, be, and the same hereby is, reversed, annulled and altogether held for nothing. And it is

Further ordered and adjudged, that the judgment entered herein in the office of the Clerk of the County of Monroe on the 6th day of December, 1904, affirming the aforesaid judgment with $162.62 costs in favor of the above named defendant and against the above named plaintiff, be, and the same hereby is, reversed, annulled and altogether held for nothing. And it is

Further ordered and adjudged, that the judgment entered herein in the office of the Clerk of the County of Monroe on the 6th day of December, 1904, affirming the aforesaid judgment with $162.62 costs in favor of the above named defendant and against the above named plaintiff, be, and the same hereby is, reversed, annulled and altogether held for nothing. And it is

Further ordered and adjudged, that the plaintiff, The City of Rochester, recover of and from the defendant, Rochester Railway Company, the sum of eighteen thousand, two hundred sixty-four dollars and two cents ($18,264.02), with four thousand two hundred ninety-two dollars and fifty-three cents,—($4,292.53) interest as computed and fixed thereon, aggregating twenty-two thousand, five hundred fifty-six dollars and fifty-five cents ($22,556.55), together with eleven hundred forty-eight dollars ($1,148) costs as taxed, amounting to the sum of twenty-three thousand, seven hundred and four dollars and fifty-five cents ($23,704.55), and
184 that it have execution therefor.

JAMES L. HOTCHKISS, *Clerk.*

(Endorsed:) Supreme Court, Monroe County.—The City of Rochester ag'st Rochester Railway Company.—Order and Judgment.—William W. Webb, Corporation Counsel,—Attorney for Pl'ff.,—46 City Hall,—Rochester, N. Y. Filed November 6th 1905 at 3.55 P. M.

185 Supreme Court of the United States.

ROCHESTER RAILWAY COMPANY, Plaintiff in Error,
vs.
CITY OF ROCHESTER, Defendant in Error.

Petition for Writ of Error.

Now comes the Rochester Railway Company, by Porter M. French, its attorney, and says that on the 18th day of October, A. D., 1905, the Court of Appeals of the State of New York made and entered a final order and judgment herein in favor of the City of Rochester, defendant in error above named, and against the Rochester Railway Company, plaintiff in error above named, and afterwards and on the 6th day of November, A. D., 1905, the records and proceedings in said cause having been remitted to the Supreme Court of the State of New York in and for Monroe County, the said final order and

judgment of the Court of Appeals were made and entered as the final order and judgment of said Supreme Court, in which final order and judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of the said relator, all of which will more in detail appear from the assignment of record, which is filed with this petition.

The said Court of Appeals of the State of New York is the
186 highest court of the said State of New York in which a decision in this cause could be had.

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the Supreme Court of the State of New York, for the correction of errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States; that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed and that upon the giving of such security all further proceedings in said court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated, 16th day of November, 1905.

PORTER M. FRENCH,
Attorney for Petitioner.

The writ of error, as prayed for in the foregoing petition, is hereby allowed and the bond is fixed at the sum of one thousand dollars.

Dated, 16th day of November, 1905.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

187 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* City of Rochester, Defendant in Error. Petition for Writ of Error P. M. French Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905 Monroe Co.

188 Supreme Court of the United States.

ROCHESTER RAILWAY COMPANY, Plaintiff in Error,
vs.
THE CITY OF ROCHESTER, Defendant in Error.

Assignment of Errors.

Now comes the Rochester Railway Company, the above named plaintiff in error, by Porter M. French, its attorney, and in connection with the petition for a writ of error filed herewith, says: that in the records and proceedings in this cause, and in the final order and judgment made and entered herein, on the 6th day of November, A. D. 1905, by the Supreme Court of the State of New York, on a

remittitur from the Court of Appeals of the State of New York, there is manifest error in this, to wit:

I.

The Court erred in holding that the act of the legislature of the State of New York, approved February 27, 1869, being chap. 34 of the laws of the State of New York for the year 1869, entitled
189 "An act for the relief of the Rochester City and Brighton Railroad Company," in connection with the ordinance of the City of Rochester passed June 24, 1862 as amended by the ordinance of said City passed January 12, 1869, together with the acceptance by the Railroad Company and its performance of the conditions, did not constitute an inviolable contract beyond the power of the legislature to alter, amend or impair.

II.

The Court erred in holding that even if such act, in connection with such ordinances mentioned in the first assignment herein and its acceptance and the action thereon by the Railroad Company, did constitute such contract, that portion thereof which exempted the Rochester City and Brighton Railroad Company from paying for new pavements, or any part thereof, in any streets mentioned and referred to in the complaint herein, was personal to such Railroad Company and did not pass to the plaintiff in error by virtue of the merger by the plaintiff in error of all of the estate, property, rights, privileges and franchises of such Rochester City and Brighton Railroad Company, made under and by virtue of the provisions of chap. 254 of the laws of the State of New York of 1867, as amended by chap. 503 of the laws of the State of New York of the year 1879.

190 III.

The Court erred in holding that chap. 565 of the laws of the State of New York of the year 1890, as amended by chap. 676 of the laws of the State of New York of the year 1892 and by chap. 933 of the laws of the State of New York of the year 1895, did not violate the provisions of sub-division 1 of sec. 10 of art. 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in so far as it repealed, or assumed to repeal, so much of chap. 34 of the laws of 1869 as exempted the Rochester City and Brighton Railroad Company from paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

IV.

The Court erred in holding that said chap. 565 of the laws of the State of New York of the year 1890, as amended as aforesaid, did not violate the provisions of sec. 1 of art. 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in so far as it repealed, or assumed to repeal, so much of chap. 34 of the laws of 1869 as

exempted the Rochester City and Brighton Railroad Company from paying for any part of the aforesaid new pavements.

191 V.

The Court erred in holding that said chap. 565 of the laws of the State of New York of the year 1890, as amended as aforesaid, did not violate the provisions of sub-division 1 of sec. 10 of art 1 of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in so far as it imposed, or assumed to impose, upon the plaintiff in error the duty of paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

VI.

The Court erred in holding that said chap. 565 of the laws of the State of New York of the year 1890, as amended as aforesaid, did not violate the provisions of sec. 1, of art. 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in so far as it imposed, or assumed to impose, upon the plaintiff in error the duty of paying for any part of the aforesaid new pavements.

Dated the 16th day of November, 1905.

PORTER M. FRENCH,
Attorney for Petitioner.

192 [Endorsed:] Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* The City of Rochester, Defendant in Error. Assignment of Errors. P. M. French, Attorney for Plaintiff in Error. German Insurance Bldg., Rochester, N. Y. Filed, Nov. 17th 1905 Monroe Co.

193 Know all men by these presents, that we, Rochester Railway Company, a corporation created by and under the laws of the State of New York, as principal, and American Surety Company of New York, a corporation, as surety, are held and firmly bound unto the City of Rochester in the full and just sum of one thousand dollars ($1,000), to be paid to the said City of Rochester, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated the 14th day of November, in the year of our Lord one thousand nine hundred and five.

Whereas, lately in the Supreme Court of the State of New York, in a suit pending in said court between said City of Rochester, plaintiff-appellant, and said Rochester Railway Company, defendant-respondent, a judgment was rendered on a remittitur from the Court of Appeals of the State of New York against said Rochester Railway Company, defendant-respondent, in favor of said City of Rochester, plaintiff-appellant, and said defendant-respondent having obtained from a justice of the Supreme Court of the United States

a writ of error and filed a copy thereof in the clerk's office of said Supreme Court, to reverse said judgment in the aforesaid suit, and a citation directed to said City of Rochester, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days from the date thereof.

Now, the condition of the above obligation is such, that if the said Rochester Railway Company, a corporation as aforesaid, should prosecute the said writ of error to effect and answer all
194 damages and costs if it fail to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

ROCHESTER RAILWAY COMPANY,
[L. S.] By JOSEPH C. COLLINS, *Secretary.*
AMERICAN SURETY COMPANY OF NEW YORK,
[L. S.] By E. FRANK BREWSTER,
Resident Vice-President.

Attest:
FREDERICK W. SMITH,
Resident Ass't Sec'y.

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 14th day of November, in the year one thousand nine hundred and five, before me personally came Joseph G. Collins, to me known, who being by me duly sworn, did depose and say, that he resided in Rochester, New York; that he is the secretary of the Rochester Railway Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

FREDERICK W. COIT,
Com'r of Deeds.

195 STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

On this 14th day of November 1905, before me personally appeared, E. Frank Brewster, Resident Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resided in the City of Rochester; that he is the Resident Vice-President of the American Surety Company of New York, the Corporation described in and which executed the within instrument; that he knew the corporate seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation, and that he signed his name thereto by like order; and that the liabilities of said Corporation do not exceed its assets

as ascertained in the manner provided by law. And the said E. Frank Brewster further said that he was acquainted with Frederick W. Smith, and knew him to be the Resident Assistant Secretary of said Corporation, that the signature of said Frederick W. Smith subscribed to the said instrument is in the genuine handwriting of the said Frederick W. Smith and was thereto subscribed by the like order of the said Board of Directors, and in the presence of him the said E. Frank Brewster, Resident Vice-President.

JACOB J. LE JOUGH,
Com'r of Deeds.

At a regular quarterly meeting of the Board of Trustees of the American Surety Company of New York, held on the 12th day of April, 1893, the following Resolution was adopted:

"*Resolved,* That the President and Vice-Presidents be and they hereby are, and each one of them is authorized and empowered to execute and deliver, and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings by law allowed; such guarantee, bonds and undertakings, however, to be attested in every instance by the Secretary, one of the Assistant Secretaries, or one of the attorneys."

STATE OF NEW YORK,
County of Monroe, City of Rochester, ss:

I, Frederick W. Smith, Resident Assistant Secretary of the American Surety Company of New York, have compared the foregoing Resolution with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original Resolution.

Given under my hand and seal of the Company at the City of Rochester, this 14" day of November 1905.

FREDERICK W. SMITH,
[L. S.] *Resident Assistant Secretary.*

I hereby approve of the foregoing bond and of the surety named therein. Dated, this 16 day of November, 1905.

R. W. PECKHAM,
Associate Justice, Supreme Court of the United States.

196 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs. Rochester Railway Company,* Defendant in Error. Bond on writ of error. P. M. French, Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905 Monroe Co.

197 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the City of Rochester, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the City of Washington in the District of Columbia, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of New York for the County of Monroe, in a case wherein Rochester Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Rufus W. Peckham Associate Justice of the Supreme Court of the United States, this 16th day of November, in the year of our Lord one thousand nine hundred and five.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Copy of the above citation received by me at the office of the Clerk of the County of Monroe in the State of New York, this 17th day of November, 1905.

W. W. WEBB,
Attorney for City of Rochester.

198 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* City of Rochester, Defendant in Error. Citation. P. M. French, Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905, Monroe Co.

199 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court of the State of New York on a remittitur from the Court of Appeals of the State of New York, being the highest Court of law or equity of the said state in which a decision could be had, before you, or some of you, between the City of Rochester, plaintiff-appellant, and the Rochester Railway Company, defendant-respondent, wherein was drawn in question the validity of a statute of, and an authority exercised under, said state, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of such their validity, and manifest error has happened to the great damage of the said Rochester Railway Company, as by its complaint

appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, that the record and proceedings aforesaid be inspected and the said Supreme Court may cause further to be done therein to correct that error, which of right and according to the laws and customs of the United States should be done.

200 Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 16 day of November, in the year of our Lord one thousand nine hundred and five.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States,

Allowed by

R. W. PECKHAM,
Associate Justice of the United States Supreme Court.

201 [Endorsed:] In the Supreme Court of the United States. Rochester Railway Company, Plaintiff in Error, *vs.* City of Rochester, Defendant in Error. Writ of Error. P. M. French, Att'y for Pl'ff in Error, German Insurance Bldg., Rochester, N. Y. Filed Nov. 17, 1905, Monroe Co.

202 STATE OF NEW YORK, *County of Monroe, ss:*

I, James L. Hotchkiss, clerk of said County of Monroe and also clerk of the Supreme Court of the State of New York held therein, do hereby certify that the annexed transcript of record of papers on appeal to the Court of Appeals of said state, the remittitur issued by and from said Court of Appeals, the order of the Supreme Court, pursuant to said remittitur, and the judgment, in pursuance of said order, thereon. I have compared with the originals thereof entered and filed in this office and that the same are true transcripts of said originals and of the whole thereof; that the annexed copies opinions of the Court of Appeals, together with a copy of the certificates of the clerk of the Court of Appeals and of the State Reporter thereto attached, I have compared with the copies opinions of the Court of Appeals and the certificates of the Clerk of said Court of Appeals and of the State Reporter, thereto attached, on file in this office and the same are true copies thereof, and of the whole thereof; that attached to such transcript of record are true copies of the writ of error, with allowance thereon, the petition for said writ, with allowance thereof, fixing amount of security therefor, made thereon, and citation with acceptance of service thereof, assignment of error and

bond on writ of error, which I have compared with the originals thereof on file in this office and find the same to be true copies of the same and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 24th day of November, 1905.

[Seal Monroe County, Rochester, N. Y.]

JAMES L. HOTCHKISS,
Clerk of Monroe County and of the Supreme Court of the State of New York.

Endorsed on cover: File No. 20,003. New York supreme court. Term No. 156. Rochester Railway Company, plaintiff in error, *vs.* City of Rochester. Filed December 4th, 1905. File No. 20,003.

FILE COPY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905

NO. 156

Office Supreme Court
FILED
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JAMES H. McKEEN

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

MEMORANDUM ON THE PART OF THE PLAINTIFF IN ERROR UPON THE MOTION TO ADVANCE.

CHARLES J. BISSELL,
Attorney and Counsel
for Plaintiff in Error.
Rochester, N. Y.

Supreme Court of the United States.

October Term, 1905.

No. 501.

ROCHESTER RAILWAY COMPANY,

Plaintiff in Error.

against

THE CITY OF ROCHESTER,

Defendant in Error.

MEMORANDUM ON THE PART OF THE PLAINTIFF IN ERROR UPON THE MOTION TO ADVANCE.

This motion is evidently made under Subdivision 7 of Rule 26 of the General Rules of this Court, that special and peculiar circumstances are shown which require the advancement of this cause in the public interest.

While the counsel for the plaintiff in error does not desire to be regarded as in any way opposing this motion, but desires it to be understood that he is anxious that the case should be advanced, if the questions presented are such as entitle it, under the rules of this court, to be advanced, yet he does not think that the statement made

by the counsel for the defendant in error in the notice of motion and in the affidavit upon which the motion is partly based, is entirely accurate in setting forth the questions which are here, nor the results which may follow the determination of those questions.

The writ of error was granted by Mr. Justice Peckham on the 17th day of November, 1905, and the return filed and appearance entered early in the month of December following. The plaintiff in error is a street railroad corporation, created under and by virtue of the general railroad act of the State of New York, being Chapter 252 of the laws of 1884. Early in the year 1890 it took a lease of all the property and franchises of the Rochester City & Brighton Railroad Company and thereafter in the same year, acquired all of its capital stock and filed a certificate in the office of the Secretary of State, provided for by Chapter 503 of the laws of the State of New York for the year 1879 and thereby became by virtue of the act, possessed for all "the estate, property rights, privileges and franchises of the said corporation (the Rochester City & Brighton Railroad Company) . . . as fully and entirely, and without change or diminution, as the same were before held and enjoyed."

It appears by the record that the Rochester City & Brighton Railroad Company was incorporated in the year 1862, under the provisions of the General Railroad Act of the State of New York for the year 1850 and in the year 1862, a franchise was granted to it by the City of Rochester, to construct and maintain a street railroad in certain of the streets of the City of Rochester.

One of the conditions annexed by the city to the enjoyment of the franchise was, that it should, during the continuance of its franchise, improve with such suitable material as the Common Council should direct and in

a proper manner, between the rails of its tracks and for two feet and four inches outside thereof, the streets in which its tracks were used.

It appears further by the record, that it mortgaged its property and franchises, the mortgage was foreclosed, the property and franchises sold, bid in by some of the stockholders who, in the year 1868, incorporated under the laws of the State of New York another street railroad company, to construct, operate and maintain a street railroad in those streets in which the tracks had been laid by the prior company, and in other streets, the corporate name being the same as that of the first company. Thereafter, negotiations were entered into between the Railroad Company and the city authorities, looking to a modification of the condition requiring the Company to pave, and in 1869, pursuant to agreement between the city authorities and the R. R. Co. the Legislature of the State of New York passed Chapter 34 of the laws of that year, entitled "An act for the relief of the Rochester City & Brighton Railroad Company," which is set out in full in the record at pages 26 et seq. This act permitted the railroad company to maintain a railroad in all the streets where its predecessor had a track then laid and with the permission of the Common Council in such other streets, in said city, as it should elect to use for that purpose. The act further modified the provisions of the original franchise, by providing a different rate of fare and section 5 of the act, after providing that the Company should keep the surface of the streets inside the rails of its tracks, in good and thorough repair, provided as follows: "That whenever any of said streets are by ordinance, or otherwise, permanently improved, said Company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street, or streets conform to the grade thereof."

The Rochester City & Brighton Railroad Company acquired a franchise and constructed its road in the two streets referred to in the complaint in this action, for the paving of which this action is brought, long prior to the passage of the General Railroad Act, Chapter 252 of the laws of 1884.

It was conceded upon the trial and in all courts upon the part of the plaintiff in error, that as to all extensions made after the passage of Chapter 252 of the laws of 1884, both the Rochester City & Brighton Railroad Company, and the plaintiff in error, took the franchise, subject to the provisions of that act in regard to the paving, and subject to the provisions of the General Railroad acts, which followed, and which are referred to in the moving affidavit herein, and the position of the plaintiff in error has been from the beginning, that as to all streets in which the Rochester City & Brighton Railroad Company acquired its franchise prior to the passage of Chapter 252 of the laws of 1884, its rights were governed entirely by the provisions of Chapter 34 of the laws of 1869, and that as to those particular streets the Legislature could not repeal the act, or deprive the plaintiff in error of its rights thereunder, as to such particular streets, without violating the provisions of the federal constitution.

Accordingly this action was brought to recover under the general railroad acts of the State of New York, for paving between the tracks and two feet outside, in certain streets in which the Rochester City & Brighton Road had acquired its franchise prior to the year 1884, and the answer set up the specific facts, pleaded the passage of the special act, Chapter 34 of the laws of 1869, and set it out in full and averred that if the general railroad law cast upon the plaintiff in error the duty of making new pavements in the particular streets referred to in the complaint, it was violative of the pro-

visions of Subdivision 1 of Section 10 of Article 1 and the provisions of Section 1 of Article 14 of the federal constitution. (See Record Answer, pp. 9, 23, 36).

The Supreme Court at the trial term held, that the General Railroad laws referred to in the moving affidavit herein, in so far as they deprived or assumed to deprive the plaintiff in error of the exemptions provided for in the special act, Chapter 34 of the laws of 1869, violated the provisions of the federal constitution and dismissed the complaint with an elaborate opinion (record p. 125). This judgment was unanimously affirmed by the Appellate Division of the Supreme Court. The Court of Appeals, by a divided court, standing four to three, reversed the judgment of the Appellate Division and of the special term, and directed judgment for the defendant in error for the relief demanded in the complaint, the facts having all been stipulated. The opinions, both the prevailing and the dissenting opinions of the Court of Appeals, appear in the printed record and are reported at 182 N. Y., 99.

The prevailing opinion in brief held that the General Railroad acts, in so far as they impose the duty of paving upon streets railroads, were an exercise of the taxing power, that the exemption given to the Rochester City and Brighton Railroad from paving, given by the act of 1869, was in the nature of an exemption from taxation.

That the provisions of the act of 1869, exempting the Rochester City & Brighton Railroad from paying for new pavements in the streets which its railroad occupied, was not a contract but was a mere nudum pactum, there being no consideration moving to the state to support its promise.

Again, that if the act of 1869 constituted a contract,

it was a contract personal with the Rochester City & Brighton Railroad Company and the exemption from paying for pavements was a privilege personal to that railroad company, and did not pass to the plaintiff in error under the lease and the very broad provisions of Section 1 of Chapter 503 of the Laws of 1879.

These conclusions are challenged by the assignments of error annexed to and forming a part of the record herein.

It will, therefore, be seen that the questions here to be determined are questions peculiarly between the plaintiff in error and the defendant in error. There is no claim made that the general railroad acts of the State of New York, as a general proposition, in any wise violate the provisions of the federal constitution, but the claim is that these acts, having been held by the highest court of the State of New York to be effectual to repeal the exemptions provided for by the act of 1869, and to deprive the plaintiff in error of the benefit thereof do violate the provisions of the Federal Constitution pleaded to that extent and to that extent only. Whether, as urged by counsel for the defendant in error, there are many other special acts granting practically the same exemptions to other railroad companies in other cities and villages, and that the decision which the court may make in this case, may be used as a precedent in regard to them, counsel for the plaintiff in error is not advised.

It is true that the amount involved in this particular controversy is not, by any means, the measure of what may be lost or gained by either of the parties by reason of the decision herein. It will necessarily be determined by the decision in this action whether the plaintiff in error is liable for the expense of paving in many other streets, which have been paved since this action was be-

gun, and to that extent the delay may be embarrassing to the municipality and to the railroad company.

But as said in the outset, if the court deems this to be a case which, within the meaning of its rule, presents special and peculiar circumstances which warrant its advancement, counsel for the plaintiff in error is perfectly willing that it should be advanced and is anxious for an early disposition. If the court should deem it proper to make such an order, counsel for the plaintiff in error desires to call its attention to the fact that the record is somewhat voluminous, and is not yet printed and asks that it may be set down for a time that will enable the parties to procure the printing of the record and the making and filing of the briefs.

All of which is respectfully submitted.

CHARLES J. BISSELL,
Attorney and Counsel for Plaintiff in Error.
Rochester, N. Y.

FILE COPY.

Supreme Court of the United States

Office Supreme Court
FILED
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JAMES H. McKenney

~~October Term, 1906, No. [illegible]~~

October Term 1906, No. 156

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

CHARLES J. BISSELL,
Attorney and Counsel for Plaintiff in Error,
ROCHESTER, NEW YORK.

WILLIAM C. TRULL,
JOSEPH S. CLARK, *of Counsel.*

Supreme Court of the United States.

October Term 1905, No. 501.

October Term 1906, No. 156.

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

CITY OF ROCHESTER,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

The above case involves the constitutionality of an Act of the Legislature of the State of New York, entitled "An Act in relation to Railroads, constituting Chapter 39 of the General Laws," passed in 1890 and being chapter 565 of the laws of that year. In so far as the provisions of Sections 90 and 98 of that Act have been held by the highest court of the State of New York to apply to such streets in the City of Rochester, State of New York, in which the plaintiff in error, or its predecessor, the Rochester City & Brighton Railroad Company, obtained its franchise and constructed its railroad prior to the seventh day of May, 1884.

The provisions of Section 90, as amended by Chapter 933 of the Laws of 1895, are as follows:

> "*Sec. 90. Street Surface Railroads. General Provisions.* The provisions of this article shall apply to every corporation which under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate a street surface railroad, or any extension or extensions, branch or branches thereof, for public use in the conveyance of persons and property for compensation, upon and along any street, avenue, road, highway, or private property, in any city, or village, or in any two or more civil divisions of the state, and every such corporation must comply with the provisions of this article. * * *"

The provisions of Section 98, material here, are as follows:

> "*Sec. 98. Repair of Streets. Rate of Speed. Removal of Ice and Snow.* Every street surface railroad corporation, so long as it shall continue to use any of its tracks, in any street, avenue or public place, in any city or village, shall have and keep in permanent repair, that portion of such street, avenue or public place, between its tracks, the rails of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities and whenever required by them to do so and in such manner as they may prescribe. In case of the neglect of any such corporation to make pavements or repairs, after the expiration of thirty days notice to do so, the local authorities may make the same at the expense of such corporation * * *"

The plaintiff in error contends that this statute is in contravention of the Constitution of the United States, in so far as it has been held to apply, as aforesaid, in that it impairs the obligation of the contract under which the Rochester City & Brighton Railroad Company, its predecessor, acquired and owned its franchises, and the Act, as construed by the highest court of the State of New York, operates to deny to the plaintiff in error, due process of law and the equal protection of the laws.

STATEMENT OF CASE.

The City of Rochester, a municipal corporation, created under the

Laws of the State of New York, brought this action against the plaintiff in error, a street railway corporation incorporated under the Laws of the State of New York, to recover, pursuant to the provisions of Section 98 of the Railroad Law, for paving between the tracks and two feet outside the tracks of said Railroad company, in St. Paul Street and Park Avenue, two of the public streets of the City of Rochester, in which the predecessor of the plaintiff in error, the Rochester City & Brighton Railroad Company, had acquired its franchise and constructed its road, prior to the seventh day of May, 1884.

(See Record, pages 3 to 7 inclusive).

The plaintiff in error interposed an Answer relying upon a Special Act of the Legislature passed February 12th, 1869, being Chapter 34 of the Laws of the State of New York for the year 1869, and also upon its franchise granted by the Common Council of the City of Rochester in the year 1862, and amended on the 12th day of January, 1869, and claimed that as to these particular streets, it was exempted by such consent of the Common Council and such Special Act of the Legislature, from making any pavements between its tracks or the rails of its tracks, or any distance outside, and specially alleged that the Sections of the Railroad Law hereinbefore quoted, if held applicable to the plaintiff in error, so far as the streets set forth in the complaint were concerned, such legislation was violative of the provisions of Subdivision I of Section 10 of Article I and of Section 1 of Article 14 of the Constitution of the United States.

(See Record, pages 7 to 17 inclusive).

The action was tried at a trial term of the Supreme Court of the State of New York, held in Monroe County in December, 1903, and all of the facts were stipulated in open court, by counsel, except one fact, which was proved by the plaintiff in error without contradiction, and found by the trial court.

(See Record containing the evidence, and Findings of Fact, pages 25 to 71 inclusive).

The trial court found, as conclusion of law, that defendant in error was entitled to judgment dismissing the complaint upon the merits, and judgment of dismissal was accordingly entered.

(See Record page 75).

An elaborate opinion was written by the trial court, which is found in the record, pages 77 to 94 inclusive.

Upon appeal by the defendant in error, to the Appellate Division of the Supreme Court in the Fourth Judicial Department, State of New York, the judgment was unanimously affirmed, without opinion.

(See Record page 95).

Upon appeal by the defendant in error to the Court of Appeals of the State of New York, the judgment was reversed and all the facts being stipulated, the Court of Appeals, pursuant to the provisions of Section 1337 of the Code of Civil Procedure of the State of New York, the material part of which is as follows: "In any action, on appeal to the Court of Appeals, the Court may either modify or affirm the judgment or order appealed from, award a new trial, or grant to either party such judgment as such party may be entitled to," directed the Supreme Court to render a judgment for the defendant in error against the plaintiff in error for the amount demanded in the complaint,—principal, interest and costs. Such judgment was accordingly entered for twenty-three thousand seven hundred four dollars and fifty-five cents ($23,704.55) on the 6th day of November, 1905.

(See Record, pages 1, 2, 110, 111).

The judgment of reversal was by a divided court, the court standing four to three. The prevailing opinion was written by Chief Judge Cullen.

(See Record, pages 97 to 101 inclusive).

The opinion of the minority of the court was written by Judge Gray.

(See Record pages 101 to 109 inclusive).

The opinions are certified by the Clerk of the Court of Appeals (See Record page 96), by the State Reporter (see Record page 109) and the Clerk of the County of Monroe. (See Record page 118).

The plaintiff is a municipal corporation, duly incorporated as a city under and by virtue of chapter 199 of the Laws of New York for the year 1834, which act, together with a number of amendatory acts, was consolidated by chapter 143 of the Laws of 1861, and the various amendatory acts thereafter passed, together with that act, were consolidated by chapter 14 of the Laws of 1880, and the charter was further amended by chapter 182 of the Laws of 1898, known as the Charter for Cities of the Second Class, and the various acts amendatory of that act. (Record page 30).

The defendant is a domestic corporation, duly incorporated under the provisions of chapter 252 of the Laws of 1884. Its articles of association were filed in the office of the Secretary of State on the 25th day of February, 1890, and the route designated in its articles of association comprised with other streets, all of the routes designated in the articles of association of the Rochester City & Brighton Railroad Company hereinafter referred to. (Record pp. 42, 43).

On or about May 31, 1862, the Rochester City and Brighton Railroad Company, a domestic street surface railroad company, was duly incorporated under and pursuant to the provisions of the General Railroad Act of the State of New York, known and designated as chapter 140 of the Laws of 1850. The route described in the articles of association of the Rochester City and Brighton Railroad Company is identical with certain of the routes described in the articles of association of the defendant. (Record pp. 30, 43).

On or about the 24th day of June, 1862, the Common Council of the City of Rochester, in the exercise of the authority conferred upon it by the General Railroad Law of 1850, consented to the construction by the Rochester City and Brighton Railroad Company of a street surface railroad upon the routes designated in its articles of association, and one of the conditions of the grant was, that the grantee should improve with suitable material as required by the Common Council of the city of Rochester and in a proper manner between its tracks, the rails of its tracks, and for two feet four inches outside thereof, and should keep the surface of the street inside the rails, and for two feet four inches outside thereof in good repair.

Section 6 of the Ordinance of 1862, provided as follows:

> "Section 6. The said railroad company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge, such children to ride free."

On July 6, 1862, the railroad company, by resolution of its directors, accepted the ordinance, and this acceptance was approved by the city. (Record pp. 31, 32, 33).

On or about the 16th day of October, 1862, the Rochester City and

Brighton Railroad Company mortgaged its rights, privileges, property and franchises to Hobart F. Atkinson, as trustee. This mortgage was duly foreclosed and at the foreclosure sale the rights, privileges, property and franchises of the Rochester City and Brighton Railroad were purchased by one Chauncey B. Woodworth. (Record pp. 32, 34).

On or about March 5, 1868, pursuant to the statutes of the State of New York, Mr. Woodworth duly associated with himself as such purchaser, certain persons and duly incorporated a company by the name of the Rochester City and Brighton Railroad Company, for the purpose of operating the railroad theretofore operated by its predecessor corporation, the Rochester City and Brighton Railroad Company.

By the terms of these last articles of association, the company was to continue for ninety-nine years. (Record p. 34).

Immediately after the incorporation of the new corporation, known as the Rochester City and Brighton Railroad Company by the purchaser and his associates, the new company petitioned the Common Council, protesting against the onerous conditions of the resolutions of 1862 above quoted, and setting forth the inability of the new corporation to proceed with the operation of the railroad subject to such conditions, and the fact that the road had never paid, owing to the existence of such conditions. Thereupon the Common Council of the city of Rochester on the 12th day of January, 1869, duly amended the last clause of section 2 of the Resolution of 1862, and also section 6 of said resolution.

Section 2 being amended to read as follows:

> "The track of said railroad shall be laid so as to permit the free passage of vehicles and carriages over the same, and the rails should be laid even with the surface of the streets and shall conform to the grades thereof as now established or as they shall from time to time be established or altered. Such company shall, as soon after the adoption of this ordinance as the condition of the streets through which their track is laid will permit, put the surface of such streets inside the rails and for one foot outside thereof, in good and thorough repair under the direction of the Committee on Streets and Bridges of the Common Council and shall thereafter keep such streets in good repair inside its tracks or between the rails of their track, only during the term of

five years and whenever it appears necessary to improve by ordinance or otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said Company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of the making of the same, during the term of five years from the adoption of this amendment."

(See Record, page 34-35).

Section 6 of the Ordinance of 1862 was, by the amended ordinance of 1869, amended so as to read as follows: "Said company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road, or from the extremity of either railway depot, a sum not exceeding five cents, except children under five years of age accompanied by parents or other persons having them in charge, such children to ride free, and except also that said company shall not charge or receive from children under twelve years of age more than three cents for any of the above distances." (Record page 35).

Shortly after the adoption of the resolutions referred to as adopted January 12th, 1869, a proposed Act was drawn by the R. C. & B. R. R. Co., a copy of which was transmitted to the Common Council of the City of Rochester, by the Mayor of said City, with a written request that said Common Council, by resolution, approve and direct the clerk to transmit the bill to the members of the Senate and Assembly, with the request that they procure its passage. That thereafter the Common Council of the City of Rochester duly passed the following resolution: "Resolved that the Clerk of this Board be authorized to transmit a copy of the bill relating to street railroads, presented by the Mayor to this Board, to the legislature, requesting that Body to legalize the action of the Common Council by the passage of said bill."

(See Record, page 35).

And on or about the 12th day of February, 1869, said Act was passed by the Legislature of the State of New York and duly signed by the Governor of said State and is entitled "An Act for the Relief of Rochester City & Brighton Railroad Company," and is known and designated as Chapter 34 of the Laws of the State of New York for the year 1869.

(See Record, page 35) And Act in full, Record, pages 17 and 18.

The first section of the Act permitted the R. C. & B. R. R. Co. to maintain and operate a railroad in all of the streets of the City of Rochester in which it had a track then laid, and with the permission of the Common Council in such other streets as it should elect to use for that purpose.

Section two of the Act gave it the right to abandon its track in certain streets.

Section three provided for the right of condemnation.

Section five of said Act was as follows:—

> "Sec. 5. Said company shall put, keep, and maintain, the surface of the streets inside of the rails of its track, in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but shall make its rails in such street or streets conform to the grade thereof."

Said Act of 1869, enacted section 6 of the Ordinance of 1862, as amended in 1869, as follows: "Section 4. Said company may and is hereby authorized to charge, collect and receive from each and every passenger for riding any distance upon its said road, towards or from the intersection of Buffalo street and State and Exchange streets in said city, the sum of five cents, except that children under twelve years of age shall only be required to pay three cents fare, and children under five years of age accompanied by parents or other persons having them in charge, shall ride free." (Record, pp. 17, 18.)

In the year 1890, the Rochester City & Brighton Railroad Company duly petitioned for and acquired from the Common Council and property owners the right to change its motive power from horse to the overhead system of electricity. (Record, pp. 41, 42.)

On or about the 25th day of February, 1890, the defendant duly leased the railroads, property, rights privileges, and franchises of the Rochester City and Brighton Railroad Company for the unexpired term of its charter and entered into the possession of the demised railroads and property. Subsequent to said lease and in the year 1890, the defendant as such lessee, duly acquired the entire capital

stock of the Rochester City and Brighton Railroad Company and accepted and received due surrender and transfer thereof and thereupon, pursuant to the provisions of the statutes of the State of New York, the estate, property, rights, privileges and franchises of the Rochester City and Brighton Railroad Company were vested in the defendant and ever since have been and now are held and enjoyed by it as fully and entirely and without change or diminution as the same were before held and enjoyed by said Rochester City and Brighton Railroad Company. (Record, p. 44.)

In or about the year 1890 the defendant obtained consent from the Board of Railroad Commissioners of the State of New York to change the motive power of the railroad so acquired by it, from horse power to electricity. It made such change, and in the course thereof reconstructed its railroad in its entirety at an expense of upwards of $4,000,000. The defendant, in making the lease and in acquiring the capital stock of the Rochester City and Brighton Railroad Company, and in the expenditure of the sum of $4,000,000 in the conversion of the railroad from a horse to an electric railroad, did so in reliance upon its exemption from paying any portion of the cost of the permanent improvement of the streets, created by its contract with the city of Rochester, confirmed by the provisions of the Act of 1869, above quoted, and the contract, Exhibit B, annexed to the answer. (Record, p. 45.)

Since the agreement and consent of the city of Rochester to the passage of the Act of 1869, and since the passage of that act, neither the Rochester City and Brighton Railroad Company nor the defendant has ever been assessed for or required to pay any portion of the expense of the permanent improvement of any portion of any street, avenue or highway included within the route of its said railroad within the city of Rochester, until after the decision of the Court of Appeals in

Conway vs. City of Rochester, 157 N. Y. 33, decided Oct. 18th, 1898.

That action was brought by a taxpayer against the City of Rochester and others, composing the Executive Board of that City, to enjoin the city from levying a tax upon the plaintiff, an abutting

property owner, for any part of the pavement constructed in Lyell Avenue in said City, in which street the Rochester City & Brighton road prior to May 7th, 1884, had obtained its franchises and constructed its railroad upon the ground that the city had not notified the Rochester Railway Company to pave between its tracks, the rails of its tracks and two feet outside as required by Section 98 of the Railroad Law. A temporary injunction was granted and dissolved by the special term of the Supreme Court and its order affirmed by the Appellate Division of the Supreme Court, the Appellate Division certifying to the Court of Appeals two questions, which were as follows:—"First, are the abutting owners on Lyell Avenue liable for the cost of constructing a new pavement between the tracks, the rails of the tracks, and two feet in width outside of the tracks of the Rochester Railway Company?" "Second, Is the duty of the Common Council of the City of Rochester to request the Rochester Railway Company to construct a pavement, between its tracks and the rails of its tracks, and for two feet outside thereof, on Lyell Avenue, before the city constructs such pavement, mandatory?"

The Court of Appeals reversed the order dissolving the injunction and answered the first question in the negative and the second in the affirmative.

The plaintiff in error was not a party to that action, although the city urged that the provisions of the Railroad Act were not applicable to that particular street, and that the provisions of Chapter 252 of the Laws of the State of New York for the year 1884 and the provisions of Chapter 565 of the Laws of 1890 were not applicable, inasmuch as the saving clauses in each of those acts saved the rights of the Railroad Company and it was not liable to pay for any part of the pavement in that particular street.

From the time of the passage of the Act of 1869, and up to the time of the passage of chapter 252 of the Laws of 1884, the Rochester City and Brighton Railroad Company kept in repair the pavement between its tracks and the rails of its tracks, as required by the ordinances and by the statute, and after the passage of chapter 252 of the Laws of 1884, it kept in repair the pavements of the streets into which it had extended its tracks under the provisions of that act, between its tracks, the rails of its tracks and for two feet outside, up to the

time of its lease of its road to the defendant, and the defendant thereafter and up to the time of the decision of the *Conway Case* by the Court of Appeals, kept in repair the pavements between its tracks and the rails of the tracks in all streets in which the Rochester City and Brighton had constructed a railroad prior to the passage of chapter 252 of the Laws of 1884, and in those streets in which either the Rochester City and Brighton or the defendant had extended its tracks after the passage of the act of 1884, it kept the pavement in repair between its tracks, the rails of its tracks and for two feet outside, and both of said companies complied with all the provisions of the act of 1869. (Record pp. 35, 36, 45, 46).

In the year 1884, the Legislature of the State of New York passed Chapter 252 of the Laws of 1884, entitled, "An Act to provide for the construction, extension, maintenance and operation of street surface railroads, and branches thereof in cities, towns and villages." This Act was known as the General Street Railroad Act. It provided for the incorporation of street railroads, and the extension of the tracks of existing railroads. Section 9 of that Act provided as follows:

> "Sec. 9. Every such corporation, incorporated under, or constructing, extending, or operating a railroad constructed or extended, under the provisions of this Act, within the incorporated cities and villages of this State, shall also, whenever and as required, and under the provision of the proper local authorities, have and keep in permanent repair, the portion of every street and avenue between its tracks, the rails of its tracks and a space of two feet in width outside, and adjoining the outside rails of its track or tracks, so long as it shall continue to use such tracks, so constructed, under the provisions of this Act. In case of the neglect of such corporations to make such pavement or repairs, the local authorities may make the same at the expense of such corporation, after the expiration of thirty days notice to do so."

Thereafter the Rochester City & Brighton Railroad Company extended its road in streets in which it was constructed, and in other streets.

On the 29th day of March, 1887, the Common Council of the City of Rochester passed an ordinance in relation to street railroads. Section 2 of the ordinance was as follows:

"Sec. 2. The track of such railroad shall be so laid as to permit the free passage of vehicles and carriages over the same * * * As soon after the adoption of this ordinance as the condition of the streets and avenues through or along which any street sunrface railroad track is now laid, will permit, the surface of such streets and avenues inside the rails of all tracks, authorized to be laid prior to May 6th, 1884, and between the tracks and rails of such tracks, and for a space two feet in width outside, and adjoining the outside rails of the tracks of an yand all extensions or branches of any railroad authorized to be constructed since May 6th, 1884, shall be put in good and thorough repair by the company, under the direction of the executive board of said city * * *"

(Record page 36, Finding 11.)

After the decision of Court of Appeals in the *Conway Case,* litigations arose between the city and Rochester Railway Company, relative to claims for pacving in streets in which the Company had obtained its franchise and constructed its road prior to 1884 and in streets in which it had so constructed and obtained its franchise after 1884. The Legislature passed a large number of special acts assessing upon the property of the railroad company the expense of all of these pavements. An action was pending in the Circuit Court of the United States, brought by the Railway Company against the city, to have such acts declared void. (*Record pp. 52, 53.*)

Thereafter and on April 26th, 1901, the Legislature passed Chapter 562 of the laws of that year. Under and pursuant to it the city of Rochester and Rochester Railway Company entered into a contract, which is set forth in full in *Finding 27, pp 53 to 61 Record.*

In and by such contract all of such claims were adjusted and compromised for the sum of $386,632.46 and a large amount of interest was thrown off by the city and arrangement made to pay a certain amount thereof in instalments, the amount of claim being made up of the costs of pavements constructed by the city in streets in which the railroad was constructed both before and after May 7th, 1884.

By the third paragraph of such contract, found at page 55, Record, it is expressly agreed that as to all claims for pavements made thereafter in any streets in which Rochester City and Brighton had obtained its franchise or constructed its road prior to the 7th day of May, 1884, the question of liability of the Railway Company to pay

for making such pavements, should be litigated and determined finally in a court of competent jurisdiction, such liability not being conceded by the Railroad Company and it being expressly agreed that such question should be judicially determined.

Pursuant to such agreement this action is brought for making pavements thereafter in two streets in which the Rochester City and Brighton Railroad Company obtained its franchise and constructed its road prior to May 7, 1884.

The Rochester City & Brighton Railroad Company obtained its franchise and constructed its railroad under the provisions of the act of 1869, in both of the streets referred to in the complaint long prior to the 6th day of May, 1884. (*Record, page 67.*) The city of Rochester in the years 1901 and 1902 paved both of these streets and served the notice required by section 98 of the Railroad Act upon the defendant, requiring it to put in repair the pavement between its tracks, the rails of its tracks and two feet outside, pursuant to the provisions of the Railroad Law. The defendant refused to comply with the city's notice and the city made the repair or new pavement itself, and expended the moneys referred to in the complaint.

SPECIFICATION OF ERRORS RELIED UPON.

The assignments of error which give rise to the contention of the defendant in error, are found at pages 112 to 114 inclusive, of the record, and are as follows:

> "I. The Court erred in holding that Chap. 34 of the Laws of the State of New York for the year 1869, in connection with the ordinance of the City of Rochester passed June 24, 1862, as amended by the ordinance of said City passed January 12, 1869, together with the acceptance by the Railroad Company, and its performance of the conditions, did not constitute an inviolable contract beyond the power of the Legislature to alter, amend or impair.
>
> "II. The Court erred in holding that even if such Act, in connection with such ordinances and acceptance, and the action thereon by the Railroad Company, did constitute such contract, that portion thereof which exempted the Rochester City & Brighton Railroad Company from paying for new pavements, or any part thereof, in any streets mentioned and referred to in the complaint herein, was personal to such Railroad Company and

did not pass to the plaintiff in error, by virtue of the merger by the plaintiff in error of all of the estate, property, rights, privileges and franchises of said Rochester City & Brighton Railroad Company made under and by virtue of the provisions of Chap. 254 of the Laws of the State of New York of 1867, as amended by Chap. 503 of the Laws of the State of New York for the year 1879.

"III. The Court erred in holding that Chap. 565 of the Laws of the State of New York for the year 1890, as amended by Chapter 676 of the Laws of 1892, and Chapter 933 of the Laws of 1895, did not violate the provisions of Subdivision I of Section 10 of Article I of the Constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, in so far as it repealed or assumed to repeal so much of Chapter 34 of the Laws of 1869 as exempted the Rochester City & Brighton Railroad Company from paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

"IV. The Court erred in holding that said Chapter 565 of the Laws of the State of New York for the year 1890, as amended as aforesaid, did not violate the provisions of Section I of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person of property without due process of law, in so far as it repealed or assumed to repeal so much of Chapter 34 of the Laws of 1869 as exempted the Rochester City & Brighton Railroad Company from paying for any part of the aforesaid new pavements.

"V. The Court erred in holding that said Chapter 565 of the Laws of 1890 as amended as aforesaid, did not violate the provisions of Subdivision I of Section 10 of Article I of the Constitution of the United States, which provides that no state should pass any law impairing the obligation of contracts, in so far as it imposed or assumed to impose upon the plaintiff in error the duty of paying for any part of the new pavements in the streets mentioned and referred to in the complaint herein.

"VI. The Court erred in holding that said Chapter 565 of the Laws of 1890, as amended as aforesaid, did not violate the provisions of Section I of Article 14 of the Constitution of the United States, which provides that no state shall deprive any person or property without due process of law, in so far as it imposed or assumed to impose upon the plaintiff in error, the duty of paying for any part of the aforesaid new pavements."

The writ of error in this case was properly directed to the Supreme Court of the State of New York, and not to the Court of Appeals, in

view of the practice in that state, for the latter court, the highest court of the state, to remit its judgment, together with the record to the Supreme Court, where the final judgment was entered, and in which the record remains.

Tinker vs. Colwell, 193 U. S. 473.
Wedding vs. Meyler, 192 U. S. 573, 581.
Crossman vs. Lurman, 192 U. S. 189, 195.

The jurisdiction of this Court to hear and determine this controversy, presented by the assignments of error, duly appears in the record. The invalidity of the statute, as being repugnant to the contract clause of the Constitution of the United States, and to Section I of Article 14, was drawn in question in each case by the use of appropriate language in the Answer of the Plaintiff in error.
(Record page 15).

And the prevailing opinion of the Court of Appeals found at page 97 of the record, clearly denied the right claimed by the plaintiff in error, under the Federal Constitution.

This Court will examine the opinions of the Court below, to ascertain the ground upon which the decision assailed was put, when such opinions are properly certified in accordance with the provisions of Rule 9.

Fullerton vs. State of Texas, 196 U. S. 192.
Henkel vs. City of Cincinnati, 177 U. S. 170.
Dibble vs. Bellingham Bay L. Co. 163 U. S. 63.

As to the non-federal questions argued in the Courts below, the decision of the Supreme Court of the State of New York, both at Trial Term and in the Appellate Division, were unanimously against the contention of the defendant in error (*Record pp. 89, 90, 94*), and the Court of Appeals reversed the judgment solely upon the ground that the provisions of the Railroad Act did not infringe the provisions of the Constitution of the United States invoked, and upon no other ground.

The only notice taken of the other questions, was in the dissenting opinion of Judge Gray, who held against the defendant in error upon those questions (*Record pp. 107, 108, 109*). Briefly they were: That the plaintiff in error and its predecessor, the Rochester City &

Brighton Railroad Company, had waived their contract right, by proceeding to extend, under the provisions of Chapter 252 of the Laws of 1884, and under the provisions of the General Railroad Act of 1890; that the plaintiff in error had waived its contract right by entering into and executing the contract between plaintiff in error and defendant in error, bearing date December 31st, 1894, and found in Finding 25, pages 49 to 52 of the Record.

These questions are not here, but within the meaning of the decisions of this court the federal questions alone are presented.

Murdock vs. Mayor etc. of M. 87 U. S. 590.
Wood Machine Company vs. Skinner, 139 U. S. 293.
Beaupré vs. Noyes, 138 U. S. 397.
Johnson vs. Risk, 137 U. S. 300.

In the last case, Chief Justice Fuller, quoting from *DeSaussure vs. Gaillard, 127 U. S. 216*, states the rule:

> "It must appear affirmatively, not only that the federal question was presented for decision by the highest court of the State of New York having jurisdiction, but thit its decision was necessary to the determination of the cause, and that it was actually decided * * *" Again, the Court further said: "Where there is a federal question, but the case may have been disposed of on some other independent ground, and it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because when put to inference as to what points the state court decided, we ought not to asume that it proceeded on a ground clearly untenable."

It does appear, upon the record here, that the highest court of the state put its decision solely upon the federal question, and that alone.

Therefore, no discussion of these questions will be made here by the plaintiff in error.

The statement in the opinion of Chief Judge Cullen, at the end of the opinion (Record page 101), as follows: "The other questions presented on this appeal are disposed of by our decision in the Conway case, and therefore do not require examination," necessarily did not refer to any of the questions herein suggested, as being non-federal. An examination of the case of *Conway vs. City of Rochester, 157 N.*

Y., 33, will show that the only questions there for determination were the two questions certified by the Apellate Division and included in them was the question whether the language of the General Railroad Act "have and keep in permanent repair" meant repairing existing pavements or making new pavements, and the court held that it meant the making of new pavements.

Upon the argument of this case in the Court of Appeals, counsel for the plaintiff in error argued at length that the decision in the Conway case was wrong and ought to be re-considered, inasmuch as the court had overlooked the saving clauses contained in the General Street Railroad Act, Chapter 252 of the Laws of 1884, and the General Railroad Act of 1890, and that was the court's answer to that contention. Again that neither the City of Rochester or the Executive Board, which were the only defendants in that action, could raise the constitutional question or be permitted to argue it, had been distinctly settled by the Court of Appeals in *People vs. B. F. & C. I. R. R. Co., 89 N. Y. 75.*

The two questions, plainly and squarely presented, by the Answer, and by the opinions of the Court of Appeals, are, *first,* does the General Railroad Act of the State of New York, in its application to the plaintiff in error, as to those streets in which it obtained its franchise and constructed its road, prior to the passage of Chapter 252 of the Laws of 1884 of the State of New York, violate the provisions of the federal constitution? *Second,* was the exemption from making pavements in such streets, granted by Chapter 34 of the Laws of 1869, construed in connection with the city ordinances, personal to the grantee, or did it pass under the merger to the plaintiff in error?

The doctrine has become settled, beyond question, in this Court, that where the claim is, that a state statute has created an inviolable contract, and the highest court of the State determines that no contract has been created, this Court will determine for itself, whether or not the alleged contract exists, and whether its obligation has been impaired by subsequent state enactment.

> *Powers vs. D. G. H. & M. Ry. Co., 201 U. S., 543.*
> *Douglas vs. Kentucky, 198 U. S. 488,* and numerous cases cited in the opinion at pages 502, 503.

Equally well settled, in this Court, is the rule that this Court will

construe the state statute, under which it is claimed that the contract rights passed by assignment or merger, and itself determine whether the language of the statute is broad enough to permit such transfer, and whether the original contract was of a nature, the rights under which might be transferred or assigned.

See cases cited under Point III in this brief.

POINTS.

I.

THE GENERAL RAILROAD ACTS, IN IMPOSING LIABILITY UPON THE PLAINTIFF IN ERROR AND THE RAILROAD AND PROPERTY OF THE PLAINTIFF IN ERROR FOR THE PERMANENT IMPROVEMENT OF THE STREETS MENTIONED IN THE COMPLAINT, IMPAIR THE OBLIGATION OF THE CONTRACT EXISTING BETWEEN THE PLAINTIFF IN ERROR, AND THE STATE OF NEW YORK, AND THE CITY OF ROCHESTER, RELIEVING PLAINTIFF IN ERROR FROM LIABILITY TO PAY OR BEAR ANY PORTION OF SUCH EXPENSE.

The question here, is, assuming that the Railroad Law, as construed by the Court of Appeals of the State of New York, was intended by the Legislature to repeal the exemption contained in chapter 34 of the laws of 1869, and deprive the Rochester Railway Company of any benefits thereunder, is such act constitutional, or does it violate the provisions of the Federal Constitution, which declare that no state shall pass any law impairing the obligation of contracts?

Under the allegations of the answer and conceded facts it does not admit of question under the decisions of the New York Courts enunciated before the passage of the general railroad act of 1890, that at the date of the passage of the acts under consideration there existed between the State of New York, City of Rochester and the Brighton Railroad Company, a contract to the effect that the Railroad Company should not be required to bear any part or portion of the expense of a new or permanent improvement of any of the streets, through

which its tracks were laid, or should thereafter be laid under the provisions of the Act of 1869.

The Brighton Railroad Company was incorporated under the General Railroad Law of the State of New York of 1850. Incorporation under that act did not of itself confer the right to construct and operate a railroad in and upon or across any streets in any city without the assent of the municipality. (Laws of New York of 1850, Chapter 140, Section 27, Subdivision 5.)

This subdivision which furnished the sole authority for constructing a railroad in the streets of a city was as follows: "To construct their road across, along or upon any * * * street, highway * * *. Nothing in this act contained shall be construed to authorize * * * the construction of any railroad not already located in, upon or across any streets in any city without the assent of the corporation of such city."

Thus, by the provisions of the General Railroad Act of 1850, the consent of the municipality is made a condition precedent to the enjoyment of a franchise to construct and operate a railroad in the streets of a city.

In the case of the Brighton Railroad Company the corporation of the city of Rochester in its original resolution of consent in 1862, imposed upon the Brighton Railroad Company as one of the conditions of its assent, the obligation to permanently improve and keep in repair the portion of the streets between the rails and for two feet four inches outside thereof.

Upon the foreclosure of the mortgage upon the franchises and property of the Brighton Railroad Company, and the incorporation by the purchaser and his associates of the new corporation under the same name, application was made to the Common Council for a modification of these conditions, and the second section of the ordinance of 1862, imposing the obligation to improve and repair was modified, upon the representations of the company, that the conditions were so onerous as to prevent the new corporation from proceeding with the operation of the railroad, subject to such condition, owing to the fact that the road had never paid because of the existence of such conditions.

This modification was made on the 12th day of January, 1869, by amending the last clause of section 2 of the ordinance of 1862, so that

it only imposed upon the new corporation the obligation to keep the street between its tracks and for one foot outside in repair for five years from the 12th day of January, 1869, and relieved it from the obligation to make any port or portion of a new and permanent improvement of the streets for five years, and modified section 6 of the original ordinance by reducing the rate of fore for children under twelve years of age from five to three cents.

Further negotiations followed between the Brighton Railroad and the City of Rochester, which resulted in the company accepting an obligation always to keep the streets in repair, upon it being relieved from any obligation to pay the expense of any new or permanent improvement.

This was accomplished by the preparation of an act which was agreed upon by the Common Council and approved by the Mayor of the city, and the Brighton Railroad Company, and transmitted to the Legislature of the State of New York for enactment by it. (*Exhibit A, annexed to the answer, Record page 17.*)

By the 5th section of this act it is provided as follows:

> "Sec. 5. Said company shall put, keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the common council of said city of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense, thereof, but it shall make its rails in such street or streets conform to the grade thereof."

And the act, by the fourth section thereof, approved and ratified the amendment to section 6 of the ordinance of 1862, made by the Common Council in 1869, by reducing the rate of fare of children under the age of twelve years from five to three cents.

Since the passage of the Act of 1869, on February 27, 1869, neither the Brighton Railroad Company nor the defendant as its successor has ever been assessed for or required to pay any portion of the expense of the permanent improvement of any portion of any street, avenue or highway included within its route until after the decision in the *Conway case.*

Whether the conditions attached by the Common Council to its

consent to the construction and operation of the railroad of the Rochester City & Brighton Railroad Company, in the streets of the city, when accepted and acted upon by the railroad company, constituted a binding and inviolable contract between the city and the railroad company, depends entirely upon the question whether the Legislature by virtue of the Act of 1850, under which the railroad company was incorporated, gave power to the city to make such conditions, or whether it vested it simply with power to give the naked consent without any conditions.

And the same reasoning applies to the amendments to the ordinance of 1862, passed by the Common Council on the 12th of January, 1869.

It was very early held in New York that a city could not, under existing statutes, confer upon individuals the right to lay railroad tracks in the city streets, nor could it make with individuals, although the purpose of such individuals thereafter to become a corporation was expressed, a binding contract for the laying of such rails, nor could it grant to them a franchise.

People vs. Sturtevant, 9 N. Y. 273.
Milhau vs. Sharp, 27 N. Y. 611, 620.

In the very late case of *Potter vs. Collis, 156 N. Y. 16,* it was held that a resolution of the Common Council of the City of New York, passed July 30, 1851, undertaking to authorize certain individuals to construct a railroad in specified streets and avenues, upon certain conditions, the individuals subsequently organizing as a corporation, was beyond the power of the Common Council and void, whether considered as a grant of a franchise or as a license.

In the opinion in that case by Judge Gray, no stress seems to be laid upon the fact that the franchise was granted to individuals who subsequently were to organize a corporation and, as we read the opinion, the court held that under the act of 1850 the Common Council could simply give its consent to the construction of the road, without any further binding conditions. After holding that the grant to the individuals was void, the court at page 30 of the opinion uses this language: "All that the municipal corporation could do within the provisions of the General Railroad Act of 1850, was to assent to the construction of a railroad."

All of the franchises and property of the R. C. & B. R. R. Co. were

mortgaged, the property sold under the mortgage and a new corporation organized which took over all of its franchises and property.

But the question is here more academic than real, because if it should be held that the act of 1850 did not authorize the Common Council to annex conditions to their consent to the construction of the road in the city streets, which when accepted became an inviolable contract, the act of 1869 was an express grant by the Legislature to the Rochester City & Brighton Railroad Company of a franchise and right upon certain conditions specified in the act itself, which to some extent re-enacted the provisions of the ordinance itself, and to the extent that the act of 1869 re-enacted the provisions of the ordinance of 1862 as amended in 1869, it directly validated the ordinance to that extent and made it a binding contract.

A careful reading of the provisions of chapter 34 of the Act of 1869, will show that the act itself does not assume to validate or confirm the resolutions of the Common Council, except only to the extent that it specifically re-enacts them. Section 6 of the act cannot be construed as validating or confirming anything. Its language is as follows: "This act shall not be construed as in any way impairing the force or effect of the resolution or ordinance of the Common Council of the city of Rochester entitled, * * * except as is herein specifically provided."

The intention of the Legislature appears to have been to grant the franchise granted by the act, subject to the conditions imposed by the act and to leave the question of the validity of the remainder of the resolutions and ordinances to be determined by existing statutes, and neither add to nor take from them except as specifically enacted.

The record shows very clearly (see *Finding 9, Record page 35*), that the act of 1869 was the result of the joint application of the railroad company and the City of Rochester to the Legislature, and both parties assented directly and clearly to any changes, which the act as passed, made in the existing ordinances, and the act came into life with the consent of the Legislature by agreement between the city and the railroad company and neither was in a position to question its legality or its constitutionality.

It was well settled law in the State of New York that the resolutions of the Common Council which are authorized by the Legislature

consenting to the use of the streets of a city by a railroad corporation, when accepted by the corporation constitute a contract.

Brooklyn Central Railroad Company vs. Brooklyn City Railroad Company, 32 Barb. 358.
People vs. Sturtevant, 9 N. Y. 273.
Milhau vs. Sharp, 27 N. Y. 611–620.
People vs. O' Brien, 111 N. Y. 1.

In the case of the *Brooklyn Central Railroad Company vs. The Brooklyn City Railroad Company* (*32 Barbour, 358*) it is said, speaking of the resolutions of the Common Council of the City of Brooklyn, granting its assent to the construction of a railroad, "the resolution * * * constituted a contract which the company was bound to perform, and which the Common Council could not rescind without adequate cause." (*p.* 364.)

Again on page 366 of the same case, reference is made to the observations upon the same question by Chancellor Kent, as follows:

> "Speaking of franchises, Chancellor Kent, in his commentaries, says (vol. 3, p. 458), 'they contain an implied covenant on the part of the government not to invade the rights vested, and on the part of the grantees to execute the duties and conditions prescribed in the grant. The government cannot resume them at pleasure, or do any act to impair the grant, without breach of the contract.'"

In *People vs. Sturtevant* (*supra*) the resolutions of a common council assenting to the construction and operation of a street surface railroad were held not to be an exercise of the legislative power, but that it was a grant upon condition (*p.* 273), and continuing, the court observes:

> "Should it even be conceded, that the resolution in question was partly legislative in its character, another part was most clearly a matter of agreement or grant."

In *Milhau vs. Sharp* (*27 N. Y. supra*) at page 620, the court, in considering a resolution of the Common Council of the City of New York granting authority to construct and operate a railroad, says:

> "It was not, as has been insisted, an act of legislation, but on

> the contrary, it possesses all the characteristics of, and was in fact, a contract. It was held to be a contract in the case of *The People vs. Sturtevant* (*9 N. Y. 273*), and but a slight examination of its provisions is requisite to show the correctness of that decision. Prior to its acceptance by the defendants, the resolution was only a proposition, having no binding force whatever. It was certainly not then a law, and since that time the common council have taken no action upon it. Upon its acceptance (if valid), it became a contract between two parties, binding each to the observance of all its provisions. * * * The defendants' counsel insists that the resolution is not a contract, but a license, revocable at the pleasure of the common council. This position cannot be reconciled with the decision in *The People vs. Sturtevant* (*supra*), nor with the principle declared by the Supreme Court of the United States in the *Dartmouth College Case* (*4 Wheat. 519*), and other kindred cases, in substance, that grants of such franchises, though made by acts in form legislative, become, when accepted and acted upon, contracts, not subject to be recalled or modified, except in accordance with express reservations contained in the grants."

In *People vs. O'Brien* (*supra*) the court, in considering the effect of a resolution of the Common Council granting to a street surface railroad corporation the right to construct and operate its railroad upon Broadway, says:

> "We are, therefore, of the opinion that the Broadway Surface Railroad Company took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the Legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. (*Sixth Ave. R. R. Co. vs. Kerr, 72 N. Y. 330; People vs. Sturtevant, 9 id. 293.*)"

It is plain, therefore, beyond all question, that subsequent to the passage of the Act of 1869, there existed between the State of New York, City of Rochester and the Brighton Railroad a valid agreement exempting it from liability for the expense of permanent improvement of the streets.

The law must be regarded as settled in New York that a municipal corporation cannot make a binding contract with any street railroad company to occupy its streets in any particular manner except by au-

thority of the Legislature. The right to occupy the streets comes from the Legislature and a municipal corporation only acts by virtue of the powers delegated to it by the Legislature. Such a contract is, therefore, subject to the right of the Legislature to alter or change it, unless the Legislature shall see fit to ratify such a contract by express legislation, and upon the faith of such a contract the railroad company expends its money, and puts itself in a position from which it cannot retreat without financial loss.

Davis vs. Mayor of New York, 14 N. Y. 506.
Milhau vs. Sharp, 27 N. Y. 611.

The Courts of the State of New York had therefore settled the doctrine, long prior to the passage of the Railroad Act of 1890, that a franchise granted to a street railroad corporation to use the public streets in a city, granted either by the municipality acting by authority of the state legislature, or granted directly by the state, acting without the intervention of the municipality, constituted property, and its burdens and benefits annexed to the grant constituted an inviolable contract which it was beyond the power of the state legislature to alter or amend in any substantial particular. Having adopted this doctrine, the decisions of the highest court of that state became a rule of property, and it was not competent either for the legislature to injure materially the value of such property by altering its benefits or burdens to the detriment of the grantee, nor is it competent for the highest court in the state, by judicial determination, to overturn, alter or amend such rule of property, by subsequent decision. This is the settled doctrine of this court.

Citizens Bank vs. Parker, 192 U. S. 73, 81.
Potter vs. Hall, 189 U. S., 292, 298, 300.
S. P. R. R. Co. vs. Bell, 183 U. S. 675, 685.
Muhlken vs. R. R. Co. 197 U. S. 544, 570.
Detroit vs. D. C. St. R. Co. 184 U. S. 368.
Olcott vs. Supervisors, 16 Wall. 678, 690.
Taylor vs. Ypsilanti, 105 U. S. 60, 71.
Los Angeles vs. City W. Co. 177 U. S. 558, 575.

We have here, therefore, an express grant of a franchise by the City of Rochester, acting under the authority of the Legislature, as given by the General Railroad Act of 1850, granting a franchise to the

Rochester City & Brighton Railroad Company in 1862. We have the amendment to that franchise of 1869, when the second Rochester City & Brighton railroad came into existence and succeeded to the rights and franchises of its predecessor. We have the Act of 1869, either granting a new franchise to the Rochester City & Brighton Railroad Company, or confirming and modifying in specific particulars, the existing franchise, imposing new burdens and extending new benefits, for a length of time co-ordinate with the length of time that the burdens were to be borne, namely, the unexpired term of the charter.

We have the case of the Company accepting the franchise and acting under it for many years, extending its road and complying with all the conditions of the Act of 1869. We have the transfer of this property right to the plaintiff in error, under the merger acts, and its compliance with all the provisions of the Act of 1869; its acceptance of those provisions and its expenditure, upon the faith of those provisions, of nearly four millions of dollars. We have the practical construction placed upon the contract by the state and city authorities, extending from 1869 to 1897, without a question raised that the railroads, and both of them, were exempted from paving between the tracks and two feet outside, in all the streets in which the franchise was obtained and the road constructed, prior to the 7th day of May, 1884, the date of the passage of the General Street Railroad Act. The State of New York now seeks, under the provisions of the General Railroad Act of 1890, as construed by the highest court of that state, to strike down benefits annexed to this franchise, and enforce to the letter the burdens imposed by it.

That this cannot be done, has been expressly adjudicated by this Court in many cases which we now desire to consider.

City of Chicago vs. Sheldon, 9 Wall. 50.

The foregoing case was much exploited by counsel for the plaintiffs in error, in the so-called "New York Franchise Tax Cases," reported in *199 U. S., 1,* and the facts in, and the doctrine of the case, are familiar to the Court.

The Common Council of the City of Chicago granted to the North Chicago Railway Company, on the 23rd day of May, 1859, the right to construct a railroad in certain streets of that city. Among the conditions contained in the grant, was the following:

"The said company shall, as respects the grading, paving, macadamizing, filling or planking of the streets or parts of the streets upon which they shall construct their said railways, or any of them, keep eight feet in width along the line of said railway, on all the streets wherever one track is constructed and sixteen feet in width along the line of said railway, where two tracks are constructed, in good repair and condition, during all the time to which the privileges hereby granted to said company shall extend, in accordance with whatever order or regulation respecting the ordinary repairs thereof, may be adopted by the Common Council."

After this contract was made and carried into execution, and up to the year 1866, the Common Council passed several ordinances for the improvement of several of the streets occupied by the railroad company. None of the expenses of the improvements were assessed upon the railroad company.

In the year 1866, the proprietors of certain lands fronting on the street where the railroad was laid, refused to pay the assessment made upon them, upon the ground that the railroad ought to be assessed for the improvement.

The Supreme Court of Illinois held that the Legislature could not constitutionally grant the power to the city to make such a contract or grant such a franchise, and that as a consequence the city was bound to assess the railroad company. A special assessment of $28,677 was imposed upon the property of the railroad company and the stockholders of the company. A stockholder, the Company itself having declined to act, filed a bill to enjoin the collection, and the court enjoined it accordingly, and from that decree the City of Chicago brought error to this court.

This court held that the grant of the franchise by the city, acting under the authority of the Legislature, was within its powers and constituted a contract, and that the practical construction put upon the contract, during the seven years from 1859 to 1866, was almost conclusive as to its meaning, if any doubt existed. And from the opinion of Mr. Justice Nelson we quote as follows:

"A contract having been entered into between the parties, valid at the time, by the laws of the state, it is not competent even for its Legislature to pass an act impairing its obligation, much less could any decision of its court have that effect."

In the franchise tax cases, this court, speaking through Mr. Justice Brewer, and referring to the Sheldon case, said:

> "An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc., of the streets upon which its railway was authorized to be constructed. The Company having accepted, complied with the terms of the ordinance. The city attempted by assessment for special improvements, to compel the railroad company to pay for further work of the nature required by the original ordinance, and it was held that the obligation assumed by the railroad company in respect to street improvements as provided by the ordinance, could not be increased by special assessments for further improvements, *but this involved no question of liability to general taxation, and only held void the effort of the city*, under the guise of city assessments, to increase the obligation specifically assumed by the railway company under the original ordinance."

In the franchise tax cases, when they were before the New York Court of Appeals, Judge Vann, delivering the opinion of the Court, used the following language, which was approved by this Court when the cases were before it:

> "Special franchises were not taxed until by the Act of 1899, amending the Tax Law, they were added to the other taxable property of the state. This is all that the statute does, so far as the question now under consideration is concerned. *No part of the grant was changed. No stipulation altered. No payment increased, and nothing exacted from the owner of the franchise.* No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support of the government."

It is respectfully urged, that this language is decisive upon this particular question. Granting that the Act of 1869 was an exercise of the power of taxation, both by imposing conditions and relieving the Railroad Company from doing a specific thing, the railroad acts, by repealing that part of the statute which contains the exemption from making new payments, in the language of Judge Vann, and that of Mr. Justice Brewer, does change a part of the grant, does alter the stipulation, does increase a specific payment, and does exact from the

owner of the franchise a particular thing, which the state promised that it would not exact. And this, although it might be questioned here, that the State has reserved to itself its general powers of taxation, that it may impose taxes upon this railroad, with others, to the extent of the value of all its property.

At the risk of repetition of what has already appeared, we wish to emphasize that the Chicago ordinance was a franchise containing conditions, granted to a street railroad company under the authority of the Legislature of Illinois. The construction of this ordinance, that it exempted the Railroad Company from making new pavements, had to be spelled out of the ordinance and supplemented by the practical construction placed upon the ordinance by the city and the Railroad Company, during the period of seven years, and yet this Court, construing the ordinance in the light of its own reason and jurisdiction, and not as construed by the state courts, held that it was a contract and did specifically exempt the Railroad Company from making new pavements.

In the case at bar, the State either by granting a franchise in toto or by amending one already granted and imposing additional conditions which were accepted, specifically said, in language admitting of no misconstruction, that the Railroad Company should not be required to do a particular thing which the general railroad acts say, in so many words, that it must do. And in addition, the practical construction placed upon the meaning of the language used in the Act of 1869, extended not over seven years, but over twenty-eight years.

Laying down the doctrine of the Sheldon case, are the following cases decided in this Court:

Detroit vs. Detroit C. S. R. R. Co., 184 U. S. 368.
City of Cleveland vs. C. C. Ry. Co. 194 U. S., 517.
Pearsall vs. Gr. Northern Ry Co., 161 U. S., 646.
(Opinion, 660–668.)
L. S. & M. S. R. R. Co. vs. Smith, 173 U. S., 694.
New Jersey vs. Wilson, 7 Cranch, 164.
Dodge vs. Woolsey, 18 Howard, 331.
McGee vs. Mathis, 4 Wall. 143.
Farrington vs. Tennessee, 95 U. S., 679.
Asylum vs. New Orleans, 105 U. S., 362.
Powers vs. D. G. H. & M. Ry. Co., 201 U. S., 543.

The latter case is the last expression by this Court upon the question involved at the time of the making and printing of the brief. This Court there held, that a statute of the State of Michigan, impaired a contract obligation, with the defendant in error, by the imposition of a different tax than the one prescribed in the contract. The defendant in error, pursuant to an Act of the Michigan Legislature, purchased the rights, property and franchises of a railroad, chartered under an Act of the Legislature of Michigan. By an Act of the Legislature of the State of Michigan passed February 13th, 1855, being the Laws of 1855, page 305, the authority to purchase was given and Section 9 of the Act provided: "The said Company shall on or before the first day of July, pay the state treasurer an annual tax of ten per cent. on the capital stock of said Company, paid in, which tax shall be in lieu of all other taxes, except for penalties imposed upon such Company by its act of incorporation, or any other law of this State. A State tax shall be estimated upon the last annual report of such corporation."

The Constitution of the State of Michigan, adopted in 1850, contained the exact clause, authorizing the alteration, amendment or repeal of charters, which is contained in the New York Constitution, a point which will be noticed further on. This Court held that the statute in question, acted upon by the Company named in the Act, and by its successors, succeeding to its *rights, franchises and property*, constituted a contract, which could not be impaired by subsequent legislation.

We desire to quote from the opinion of Justice Brewer:

> "Surely no clearer case of contract can be presented than one in which the Legislature passes an Act in respect to a particular corporation, making special provision concerning taxation, and does so with a view of inducing large expenditures by the corporation, and the condition of an unfinished road, whose completion is deemed of great importance, and where the franchise, is, as required, formally accepted, the expenditures made, and the road completed."

Justice Brewer then states that the suggestion is made that the provision is not in terms made perpetual and he states that a suf-

ficient answer is found in the opinion in *Home of the Friendless vs. Rouse, 8 Wallace, 437*, which he quotes as follows:

> "Testing the contract in question by these rules, there does not seem to be any rational doubt about its true meaning. 'All property of said corporation shall be exempt from taxation' are the words used in the Act of incorporation, and there is no need of supplying any words to ascertain the legislative intention. To add the word 'forever' after the word 'taxation' could not make the meaning any clearer. It was undoubtedly the purpose of the Legislature to grant to the corporation a valuable franchise, and it is easy to see that the franchise would be comparatively of little value if the Legislature, without taking direct action on the subject, could at its will resume the power of taxation."

The Court will bear in mind that in the case at bar, the contract is with a single corporation, and it is a contract to exempt it from a specific and particular thing. Therein lies the distinction between this case and the numerous cases cited by the Chief Judge of the Court of Appeals in his prevailing opinion.

We also cite in this connection:

New Jersey vs. Yard, 95 U. S., 104.
Home of the Friendless vs. Rouse, 8 of Wall., 450.
Washington University vs. Rouse, 8 of Wall., 439.

In all of the above cases, the State distinctly made a contract to exempt from taxation, to a certain extent, property of the defendant in error, in the first case, and of the plaintiffs in error in the two other cases; and the contracts were, in the several cases, held to be inviolable, and beyond the power of the State to alter, amend or abrogate.

In the New Jersey case, the statute required a written acceptance, which was given. In the Rouse cases, the only acceptance required or given was the action by the plaintiffs in error, in the several cases, in proceeding to invest their capital upon the faith of the promise.

In the Rouse cases, this Court reiterated the rule long established, that it was within the power of the state legislature to exempt the property of an individual or corporation, from taxation, either for a specified period or permanently, and approved the doctrine as laid down in the Dartmouth College case.

based solely upon the broad ground that a state legislature did not possess the power to exempt any property from taxation, but that doctrine has never obtained in this Court. But from that dissent doubtless flowed the doctrine now recognized, that all such exemptions will be strictly construed and nothing taken by implication.

In the Rouse cases, as before said, the statute required no written acceptance, and the acceptance consisted simply in acting under the statutes and expending money in erecting buildings and entering upon the execution of the charitable purposes contemplated. The language of Mr. Justice Davis, in delivering the opinion of the court, already appears at page 28 of this brief, quoted by Mr. Justice Brewer.

It was argued in the Court below, by the counsel for the defendant in error here, although the Court of Appeals did not, in its opinion, notice the contention, that the ordinance of 1862, as amended by the ordinance of 1869, and the Act of 1869, and the acceptance of the Act, and all these ordinances by the Rochester City & Brighton Railroad Company did not constitute a contract; at least that the Act of 1869 did not extend the time of five years as provided by Section 2 of the amended ordinance of 1869, but intended to leave that limitation of time in full force and effect. The cases hereinbefore cited are a sufficient answer to this contention. But as to the five-year limitation, we say: It would seem very clear that the intention of the City of Rochester and of the railroad company, when they together prepared the act and sent it to the Legislature for passage, and the intention of the Legislature in passing it, was to dispense with the limitation of time of five years during which the railroad company was to make repairs, and during which time it was to be exempt from paying any part of the expense of a new pavement.

The construction claimed would be at war with the language of the act itself, and with the expressed intention of both the city and the railroad company in formulating the act, and sending it on for passage, and at war with the practical construction placed upon it by both the city and the railroad company, clear up to the time of the decision of the *Conway case*.

The purpose of the act was to make both its burdens and benefits applicable to the railroad company during the unexpired term of its charter.

That this is the only construction that can be placed upon it, a careful examination of each provision of the act will demonstrate. Section 1 grants a franchise to the railroad company to maintain and operate a railroad in all of the streets of the city, in which it has a track laid at the time of the passage of the act, and further, with the permission of the Common Council to lay a track, and maintain and operate a railroad in such other streets in the city as it should elect to use for that purpose, with the permission of the Common Council, and with the same consent to lay a double track in any street or streets where it has a single track.

The company was organized, as appears by its articles of association, to continue for ninety-nine years, and the franchise not being limited in any way must have been intended to be for the unexpired term of the charter. Consequently the conditions subsequently annexed to the franchise by the succeeding provisions of the act must, unless expressly limited, have been intended to exist as long as the franchise. Section 2 of the act provided for the abandonment of tracks in certain streets. Section 3 invested the defendant with the power of eminent domain. Section 4 fixed absolutely, during the unexpired term of the company's charter, the rate of fare. Section 5 is the section in question and was intended to be a condition to exist as long as the life of the franchise and the charter.

Assuming that the Legislature intended to grant a franchise in all these streets of the unexpired term of the company's charter, and then to provide that at the end of five years it should be under no obligation whatever to repair the streets or any part of them in which its track was laid, would absolutely relieve the railroad company from any liability, either to repair or to make new pavements, because section 2 of the ordinance of 1869 absolutely repealed and took the place of section 2 of the ordinance of 1862, and no part of section 2 of the ordinance of 1862 remained in life after the adoption of the amendment of 1869; giving the act then the construction contended for by the appellant's counsel, and it necessarily results in the conclusion that the Legislature intended that at the expiration of five years, the railroad company was to be relieved from the burden, not only of making pavements, but even of making repairs. Such a construction is absurd. Further under the amended ordinances the repairs were to be made between the tracks and *one foot* outside. By Section 5 of the act the

repairs were to be *between the tracks only*, and then is the construction placed upon the section by both parties for twenty-eight years.

We now desire to examine, with some care, the opinion of the majority of the Court of Appeals. As before said, the Court held, first, that neither the ordinance of 1862 as amended in 1869 together with Chapter 34 of the Laws of 1869, constituted an inviolable contract between the city or the State of New York, and the Rochester City & Brighton Railroad Company.

That the Act of 1869 was but the exercise of the state's taxing power, and it had the right to alter, amend or repeal it. *Second*, that even if the Act of 1869, constituted a contract, the exemption from making pavements was a privilege personal to the Rochester City & Brighton Railroad Company, and did not pass to the plaintiff in error, under the merger effected in 1890.

The prevailing opinion argues that the Act of 1869 was not the grant of a franchise made directly by the Legislature, but that the franchise was granted by the ordinances of 1862 and 1869, and the Act was a regulation thereof. Many cases in this and other courts are cited by the learned judge to sustain his contention under the first subdivision here noticed. And it becomes necessary to examine, with some care, the doctrine upon which these cases rest; and first, as to the materiality of the question, whether the Act of 1869 was the direct grant of a franchise, or whether it was an exercise of the power of taxation, and merely amended or altered an existing franchise.

Clearly the City had power, under the Act of 1850, to grant the franchise. Whether it had any power to impose conditions has never been directly determined by the Court of Appeals and was not determined by its decision in this case. Whether the Railroad Company, having accepted the franchise and acted under it, would be estopped to dispute the validity of the conditions imposed, is a question not necessary to discuss.

In any event it appears without dispute, that both parties appealed to the Legislature and that appeal resulted in the passage of the act.

Now whether the Railroad Company already had its franchise or whether the franchise must be deemed to have been granted by the Act of 1869, is immaterial. The original franchise of 1862 named certain streets in which the Company might operate, and no others, and named the particular parts of such streets in which the Company

might operate. The Act of 1869 expressly empowered the Railroad Company to maintain and operate a railroad in all of the streets of the City in which it at that time had a track laid. If this were not the granting of a franchise it was at least the confirmation of an existing franchise and the Legislature proceeded to prescribe the conditions upon which the rights granted should be exercised. It also granted the right to the Railroad Company to maintain and operate a railroad in all other streets in the City that it should elect to use, with the consent of the Common Council. It is very clear that when it did extend in the other streets, it became subject to the conditions imposed by the Act of 1869. With the same consent it was authorized to lay a double track in any street or streets, where it had a single track, and the first section of the act provided that it should not be bound or required to construct and operate a railroad in any street of the City where there is now no track.

This relieved it from any forfeiture of its charter, which under the Act of 1850 might have taken effect on account of its omission to construct in all the streets named in the original franchise.

The significance of the decision of this Court in *Worcester vs. Worcester Street Railway, 196 U. S., 539*, cited in Chief Justice Culleus opinion, becomes apparent. There this Court held the franchise granted to the Worcester Railway Company, with conditions annexed by the municipality of Worcester, acting by authority of the Legislature, was a binding contract. And further held that with the consent of the Railroad Company and against the wishes and protest of the municipality, the Legislature had the power to alter it in a material particular.

And the decision proceeds upon the theory that the municipality, being a mere political subdivision of the State, and the creature of the Legislature itself, and acting in the making of the contract merely as an agent of the principal, the State itself, the State could alter or amend the contract as it chose, with the consent of the Railroad Company. That the City, acting by virtue of the powers conferred upon it by the State, could not be said to possess a property right in the performance of the conditions imposed by the conditions annexed to the franchise.

Therefore, in the case at bar, whether the conditions annexed to the franchise by the City of Rochester were or were not binding upon the Railway Company and whether or not it took, under the ordinance

of 1862, a perfect franchise, untrammeled by any condition, it does appear that both parties consented that the state should modify any contract that had theretofore been entered into between them and the state did modify the contract, assuming that one existed, or did make a new one, assuming that none had theretofore existed, by the passage of the act of 1869 and the acceptance of that act by the Railroad Company.

The Railroad Company reduced its rate of fare as to children between the ages of five and twelve years, as directed by the act. Whether it was bound to charge this rate of fare, under the conditions annexed to its franchise, has not been determined but there was a question there which was settled by the Legislature. It continued, as appears by the record, to keep in repair the space between its tracks and the rails of its tracks. Whether it was bound to do this under its franchise is immaterial, for the reasons last stated. It accepted the provisions of the act of 1869, by extending its railroad into a large number of streets not named in its original franchise, among which streets were the two streets for the paving of which the present action is brought, and also into a large number of other streets, and expended large sums of money in making such extensions. (*See Record, Finding of Fact 10, pages 36, 37.*)

Starting with the unavoidable concession, that under the doctrine of the Worcester case and under the doctrine of the numerous cases decided in the Court of Appeals and beginning with the *People vs. Sturtevant, 9 N. Y., 273,* if the Common Council of the City of Rochester, possessing the power from the Legislature so to do, had passed the Act of 1869 in the shape of a city ordinance and it had been accepted and acted upon by the Railroad Company, it would have constituted an inviolable contract, and the same exception from the expense of making new pavements, which is contained in the act, if contained in the ordinance calling it an exemption from taxation, or an exercise of the taxing power or police power, or whatever name you may choose to give it, would have still been an inviolable provison, binding upon the city, which concededly passed the ordinance solely by virtue of the power conferred upon it by the Legislature.

Why, when the Legislature steps in and does the same thing in the same language which its agent might by it be authorized to do, is it not, when acted upon, a contract, the same as if it had been in the form of a city ordinance?

In the majority opinion, *182 N. Y., 116*, it is said,

> "The true test of whether there was any consideration for the exemption granted by the statute is whether any acceptance of its terms and provisions was necessary to make it effectual. If not, how can it be said that the exemption is other than a privilege? Here lies the distinction between this case and that of *New Jersey vs. Yard, 95 U. S., 104*. In the case cited the statute of New Jersey required the written acceptance of its terms by the company or else it became wholly inoperative."

In answer to this we say that the New Jersey statute required a written acceptance without which there could have been no contract. Assuming that the statute of New Jersey had not required a written acceptance, but the Railroad Company had gone on upon the faith of the statute and completed its road to Phillipsburg and complied with the condition, would any court have said that because the statute did not require the acceptance in writing there was no acceptance and hence no contract?

In the case at bar had the statute of 1869 required a written acceptance and none had been given, there would have been no contract. It did not require a written acceptance and, therefore, the acceptance by the railroad in acting under it and extending its road under it, constituted an acceptance, constituted a consideration for a binding promise.

Section 5 of the act imposes the duty upon the company to keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair.

Surely, the company having accepted and acted under the provisions of this act could not be heard to say that it was to keep the streets in repair only for a limited time and might, at its own will, repudiate this obligation. The promise upon the part of the state is equally strong, "but *whenever* any of said streets are by ordinance or otherwise, permanently improved said Company shall not be required, etc."

Surely this was a promise to the Railroad Company to exempt it from doing a particular thing, so long as it was bound to do the particular thing or things that constituted the consideration for its promise.

Again, the Court in the prevailing opinion, after referring to the language of the act just referred to, uses this language:

> "This certainly did exempt the Company from any expense of repavement so long as the statute remained in force. But

the question is, did the statute confer upon the company any contract right immune from subsequent recall, or was it the mere exercise by the Legislature of the taxing power, which could at any time be changed, modified or repealed?"

In this connection we concede that the State is never presumed to surrender the taxing power. The Courts require the clearest and most unmistakable statement of such an intention before such a conclusion will be reached, and there are numerous cases which hold that where a particular or specific tax is imposed upon a particular corporation, the power of the State to impose other and different taxes to which all property is subject, will not be presumed to have been surrendered, even although the specific tax may amount to a contract so far as regards that special thing.

The State may not alter the amount of the specific tax, but it may impose other and different taxes.

It may be assumed, as stated in the prevailing opinion, that the Act of 1869 did not, in terms, assume to ratify any existing contract between the City of Rochester and the Railroad Company. Or, on the other hand, it may be assumed that there did exist between the City and the Railroad Company, a valid and binding contract. Then, within the meaning of *Worcester vs. Worcester Railway Company,* cited *supra,* the Act of 1869 either made a new contract with the Railroad Company or it altered and amended an existing contract between the City and the Railroad Company, either act the Legislature had perfect power to perform with the consent of the Railway Company, as determined in the Worcester case. Looking at the situation from either point of view the Legislature exercised its undoubted power in the premises and stipulated with a particular corporation, that in consideration that the Railroad Company would do certain things, the State would refrain from doing certain things.

As shown in the cases cited, it was not necessary to specify any particular length of time, or to use the word "forever," the conclusive presumption being, that the contract was to exist perpetually or during the unexpired term of the Charter of the Railroad Company.

And in this connection counsel desires again to reiterate, that at the time of the passage of the ordinance of 1862 and of the amendment thereto of 1869, and the passage of Chapter 34 of the Laws of 1869,

there existed no general statute imposing upon street railroads any obligation, either to keep the streets or any portion thereof in repair, or to make new pavements in any portion of the streets occupied by its tracks. That matter was purely a question of contract between the several municipalities and the several railway companies, where the municipalities had power from the Legislature to impose such conditions.

In very many of the special charters of railroads passed by the Legislature, prior to the Constitutional Amendment, the State itself prescribed these duties and the extent thereof. The State had adopted no general policy whatever in regard to these matters, nor did they adopt one until the passage of the General Act of 1884, Chap. 252 of Laws of New York for 1884. Therefore, the question of repairs, the question of new pavements in the streets occupied, became purely a question of contract between the parties, to be settled and disposed of as they might agree and if the franchise offered contained provisions too onerous the Railroad Company need not accept.

In this situation of affairs, the Act of 1869 was passed confirming the franchise in the old streets, or granting a new one, as you please, extending the franchise into other streets than those named in the original ordinances, and providing the exact measure of duty upon the part of the Railroad Company in the streets in which it had already built and in the streets in which it was in the future to build. The Railroad Company accepted the provisions of this act, by proceeding to operate its railroad and extend its lines under it. And it is respectfully submitted, by counsel for plaintiff in error, that in the various cases cited in the prevailing opinion and in the other cases cited by counsel, that the doctrine enunciated in the majority opinion of the Court of Appeals is not sustained, but that the weight of au- lays down the doctrine contended for by counsel for plaintiff in thority lays down the doctrine contended for by counsel for plaintiff in error.

There is no doubt but that there exists a wide distinction between upon a particular corporation certain rights and exemptions, and those upon a particular corporation certain rights and exemptions and those where the Legislature has, under a general act, held out inducements to all corporations and individuals to engage in a certain business. Even where a corporation or individual has engaged in a particular business and expended moneys on the faith of the general act, this

Court has held in some particular instances that the act does not constitute a contract; it is a mere expression of the present economic policy of the state and may be changed or altered at any time. Keeping in view this distinction, counsel desires to call the court's attention to certain cases cited in the opinion of the majority of the court of appeals and certain cases analogous to those cited.

Christ Church Hospital vs. Philadelphia, 24 Howard U. S., 300, is a case cited in the majority opinion of the Court below. In that case the Legislature passed an act, which recited that the Christ Church Hospital, an existing corporation, was having its usefulness limited by reason of the decay of its buildings and the increasing burden of taxes, and it was enacted, "the real property, including ground rents now belonging and payable to Christ Church Hospital in the City of Philadelphia, so long as the same shall continue to belong to said Hospital, shall be and remain free from taxes." This was held to be a mere gratuity, a privilege that existed *bene placitum,* to be revoked at the pleasure of the sovereign and it is very evident that it was a mere gratuity. The corporation was required to do absolutely nothing, the favor was bestowed upon it by the State to enable it to repair its buildings and to get upon its feet, and there was no consideration moving to the State that could uphold a promise not to alter, amend or repeal the act. It is as naked a case of a mere gratuity as is to be found in the books.

Tucker vs. Ferguson, 22 Wallace, 527, is cited in the majority opinion of the Court below.

The facts in this case are somewhat complicated. Congress granted to the State of Michigan, certain alternate sections of public lands to aid the State in the construction of railroads. This act was passed June 3d, 1856. The Flint & Marquet Railroad was organized in 1857 under the General Railroad Act of Michigan of 1855. Congress permitted the State to grant these lands to railroads upon certain designated routes. The State accepted the grants and gave to the Railroad Company certain of the lands to be used for the purposes of the road and provided that no tax was to be imposed on the lands of the company for seven years, except such lands as should have been sold, provided for certain specific taxes and then declared, in regard to the several taxes, that they "shall be in lieu of all further taxes to be imposed in this State."

Subsequent acts were passed and in 1871 an act was passed in relation to the lands granted to the railroad, which stated, "that no such lands shall be subject to taxation until after the expiration of three years from and after the 1st day of April, 1871, and until after three years after the dates of the certificates showing that such lands had been earned by said Railroad Company." The Constitution of the State at all these times contained the usual provision as appears in the New York Constitution. "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All laws passed pursuant to this section may be altered, amended or repealed."

The Court held that the State had complied with its agreement to forbear to tax for seven years, that the provision of the Act of 1871, exempting the lands specified from local taxes and for three years from the first of April, 1871, was *nudum pactum*. The railroad was already constructed. It already held title to the lands. It did nothing and was required to do nothing in exchange for the privilege and the Court said, citing the Christ Church case,

> "there was no consideration. The company was required to do nothing and did nothing in return. As between individuals the stipulation would belong to the category of nude pacts. It has no higher character because one of the parties was a State and the other a corporation, and it was put in the form of a statute. It was the promise of a gratuity, spontaneously made, which might be kept, changed or recalled at pleasure."

Pennsylvania Railroad Company vs. Miller, 132 U. S., 75.

In this case the Charter of the Pennsylvania Railroad Company under the Pennsylvania Acts of 1846 and 1847, provided that it might construct a railroad from Harrisburg to Pittsburg, might take lands and necessary materials for the purpose, "provided such compensation shall be made, secured or tendered to the owner or owners of any such lands or materials as shall be agreed upon between the parties or in such manner as is hereafter mentioned."

The Seventeenth Section of the Act authorized the railroad to make such elevated railroads, extensions and branches as by the president and directors of the company might be deemed advantageous. By the Pennsylvania Constitution of 1873, it was provided that cor-

porations invested with the privilege of taking private property for public use, "shall make just compensation for property taken, injured or destroyed by the construction or enlargement, etc., etc." In 1880 and 1881 the Pennsylvania Company extended its road and built an elevated railroad, doing damage to the adjoining property of the plaintiff, for which action was brought.

The court held, and very properly, that as to this extension the Company acted under the existing laws, that the contention that there was a contract with the Company, that it might make, under its original charter, all kinds of extensions subject to the only liability spoken of in the charter, was unsound. As was said by Justice Blatchford,

> "But the defendant took its original charter subject to the general law of the state and to such changes as might be made in such general law and subject to future constitutional provisions or future general legislation. Since there was no prior contract with the defendant, exempting it from liability to such future general legislation in respect to the subject matter involved. * * * The provision contained in the constitution of 1873 was merely a restraint upon the future exercise by the defendant of the right of eminent domain imparted to it by the state."

And the court further in its opinion likened the case to the one which exists under the statute, imposing a liability to damages for the negligent killing of any person, which law was not in existence when a vast number of railroads were incorporated, but no one ever doubted the authority of the Legislature to pass such a law, although it did impose an additional liability.

> *New Orleans C. & L. R. R. Co. vs. City of New Orleans, 143 U. S. 192.*

This was an action in favor of the City to collect license tax from the Railroad Company imposed by an ordinance of the city pursuant to a statute, which provided that the business of carrying on the street railroad, the annual license, based on the annual gross receipts, shall be as follows: "When the said annual gross receipts are $500,000 or in excess of that amount, the license shall be $2,500." It appeared that in October, 1879, the city of New Orleans sold to the New

Orleans City Railroad for the price of $630,000, the right of way and franchises for running certain lines of street railroad until January 1st, 1906.

The Company agreed to construct its railroad, keep the streets in repair and comply with regulations etc. and to "annually pay into the City Treasury upon the assessed value of said road and fixtures the annual tax levied upon real estate, the value of said road and fixtures to be assessed by the usual mode of assessment." The railroad was afterwards sold to the plaintiff in error. The court, in a very short opinion, held that there was nothing in the terms of sale of the railroad that prohibited the city from imposing a license fee in the future. Nor could such an agreement be spelled out of the contract of sale. The Company simply agreed to do what all others did, pay its taxes, and there was no agreement, expressed or implied, that the city should not in the future impose further conditions, not repugnant to the terms of the grant itself. The doctrine is the same as that enunciated in this Court in the franchise tax cases, which have been referred to.

Memphis Gas Light Co. vs. Shelby County, 109 U. S. 398, was a case of the same nature. The Company claimed to be exempt from the imposition of a license tax. The charter of the Company, which it was claimed contained an exemption from the imposition of any further taxes, was section 5 as follows:

> "Said Company shall have the privilege of erecting * * * gas-works and manufacturing * * * in the city of Nashville * * * for a term of fifty years from and after the date of this act. A reasonable price per thousand feet for gas shall be charged * * * provided said company shall never charge more than one cent for every cubic foot of gas used * * * nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas."

The only argument the counsel for the Company used was that the agreement fixed the price of gas, and therefore an agreement was implied that no license fees or taxes should be imposed, as it would permit the State to destroy the privilege granted. The power of the State to destroy property by the imposition of taxes, provided there

is no contract prohibiting their imposition, was declared to exist by Justice Marshall almost at the beginning of the government and has never been questioned since.

These are the leading cases in this Court dealing with alleged contracts directly between the Legislature and an individual corporation. That there is a wide distinction between such contracts and alleged contracts, under a general law of the State prescribing as to a particular class of corporations or individuals, certain immunities of which general law, corporations or individuals avail themselves, is well settled under the authorities.

In the outset we wish to call the Court's attention to the case of *State Bank vs. Knoop, 16 Howard, 369.*

This case arose under the General Act of the Legislature of the State of Ohio, providing for the incorporation of banks. The Sixtieth Section of the Act provided that each banking company, incorporated under the act, should semi-annually set off to the State six per cent, on the profits, deducting therefrom the expenses and ascertained loss for the six months preceding. "Which sum or amount so set off shall be in lieu of all taxes to which the company or the stockholders therein would otherwise be subject." By a subsequent act, the Legislature imposed further taxes, the right to collect which was challenged by the plaintiff, incorporated under the act in question.

The Supreme Court, speaking through Justice McLean, held that the effect of the act was to constitute an inviolable contract with each corporation which accepted the provisions of the act and expended its money upon the faith thereof. The Court held that the effect of the act was to create a separate contract between the State of Ohio and each bank organizing under the act and accepting its provisions.

East Saginaw Salt Mfg. Co. vs. City of East Saginaw, 13 Wallace, 373.

This was a case where the plaintiff in error was incorporated under a general law of the State of Michigan, which provided for the incorporation of companies to bore for and manufacture salt, and applied to any and all individuals engaged or to be engaged in such manufacture, provided that all should be entitled to the benefit of the provisions of this act. Section2 provided, "All property, real and personal, used for the purpose mentioned in the first section of this act shall be

exempt from taxation for any purpose." Section 3 provided for a bounty of ten cents for each and every bushel of salt manufactured by any individual or corporation, provided that such individual or corporation manufactured at least 5,000 bushels as specified above, and the bill set out that the plaintiff had become incorporated under and by virtue of the provisions of the act and had expended large sums of money, in reliance upon its provisions. This Court, speaking through Mr. Justice Bradley, conceded the power of the State to exempt property from taxation, either for a limited time or perpetually, and held that in this case no contract was made, that the offer of the Legislature was a mere gratuity made in pursuance of an economic policy to encourage the manufacture of a certain article, and that it was not bound to continue it indefinitely. Mr. Justice Bradley draws the clear distinction for which we here contend, between the case at bar and the case under consideration, in the following language:

> "Had the plaintiff in error been incorporated by a special charter and had that charter contained the provision, that all its lands and property used in the manufacture of salt should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that *all corporations and individuals,* who shall manufacture salt in Michigan * * * shall be exempt from taxation as to all property used for that purpose * * * ." Again, "As the Supreme Court of Michigan says, it is a bounty law and nothing more. A law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal."

The opinion then goes on to state that no one is obliged to accept the provisions of the act; no one is obliged to continue in the manufacture of salt for any length of time; no one accepting the provisions is bound to continue for a day. Neither was the State bound to continue this general offer for any particular length of time. Again the Court says,

> "Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State and

> corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the Legislature are binding on both parties."

Then the Court proceeds to distinguish the Ohio case as follows:

> "And so corporations formed under general laws in place of special charters, like the Ohio banks, under the General Banking Law of that State, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters."

The Court then called attention to the language of Justice McLean in *Bank vs. Knoop,* as follows: "The act is as special to each bank as if no other institution were incorporated under it."

The court then, in the principal case, continues,

> "In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that during the existence of any corporation formed under the act, the stiplation or exemption specified in it is to operate. The act under consideration cannot be interpreted on this principle. It applies to individuals as well as corporations and to all corporations having power to manufacture salt."

It is very clear that the decision was placed upon the express ground, that the offer contained in the statute was simply one dictated by the policy prevailing at the time the offer was made, and could not be construed into a contract with every separate individual or corporation who might avail themselves of its provisions.

Stanislaus vs. S. J. & K. R. C. & T. Co. 192 U. S., 201.

This case is entirely analogous to the last one cited. Defendant in error was incorporated under a general act of the Legislature of the state of California. That act provided that every company organized sh[illegible]ld have power to establish, collect and receive rates, water rents or tolls, which shall be subject to regulation by the Board of Supervisors of the County in which the work is situated and continues, "but which shall not be reduced by the supervisors so low as to yield the stockhold-

ers less than one and one-half per cent. per month on the capital actually invested." The Company was incorporated in 1871 and in 1885 the Legislature passed an act permitting the Board of Supervisors to fix the rates not less than six nor more than eighteen per cent, upon certain valuations, it being in direct hostility to the provisions of section 3. The defendant in error invoked the federal constitution. Mr. Justice Peckham, in delivering the opinion of this court, uses this language:

> "No special charter was given the company, directly from the Legislature, otherwise than is contained in the powers granted by the two acts above named."

Further on the opinion continues.

> "The authority given by the act of 1862 enabled the Board of Supervisors to conditionally regulate the rates. There is no promise made in the act that the Legislature would not itself subsequently alter that authority. The state simply authorized its agents, the Boards of Supervisors, to regulate rates but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied, that the state might not thereafter authorize the Boards to reduce them, or that it might not itself do so directly. Even as between individuals such an implication would not be a reasonable one from the language used. * * * This portion of the act applies to the boards and limits their right of reduction, leaving unhampered the right of the state to interfere directly or by authorizing the boards to reduce the rates below the point stated in the act."

At page 211, the opinion puts the decision upon grounds which cannot be challenged and states that assuming that there was a contract, the rates could be changed under the provision of the constitution of 1849, which is an exact copy of the New York constitution in regard to the reserved right to alter, amend or repeal the charters of corporations formed under general statutes, and the court holds, that the alteration made by the subsequent act was a reasonable alteration under the circumstances.

But the case of *W. & M. Railway Co. vs. Powers, 191 U. S., 379*, exactly defines and limits the doctrine. In that case it appeared that in 1893 the Legislature of the State of Michigan passed an act which provided, "that the rate of taxation fixed by this act

or any other law of this State, shall not apply to any railway company hereafter building and operating a line of railroad within this State north of parallel 44 of latitude, until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile."

Under this act the M. & N. Railroad Company was incorporated and then conveyed all its property, rights and franchises to the plaintiff, a Wisconsin corporation, which thereupon constructed the road. It is north of parallel 44 and its gross earnings never equaled $4,000 per mile. In 1897 the state amended the act of 1893 and levied a specific tax upon the business of every railroad corporation. The federal constitution was invoked by the plaintiff in error. The court states, at page 385, speaking through Mr. Justice Holmes,

> "The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms.
>
> The question is pretty well answered by a series of decisions in this Court. A distinction between an exemption from taxation contained in *a special charter* and general encouragement to all persons to engage in a certain class of enterprise is pointed out in *E. S. S. M. Co. vs. East Saginaw, 13 Wallace 373.* In earlier and later cases it was mentioned that there was no counter obligation, service or detriment incurred that properly could be regarded as a consideration for the supposed contract. (Citing cases.) But whatever the ground, thus far attempts like the present, to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties, have failed."

Justice Holmes then proceeds,

> "In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements, each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive, each for the other in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. If we are to deal with this provision in a general tax law, as we should deal with an alleged

simple contract, while, no doubt in some cases between private persons the above distinctions have not been kept very sharply in mind, (citing cases) it is clear that we would require an adequate expression of an actual intent on the part of the State to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change."

In the following language Mr. Justice Holmes states the true ground for the decision of all these cases and draws in a masterly way the distinction between a general offer by a State to all persons choosing to avail themselves of it, pursuant to an economic policy, and contracts entered into with an individual corporation:

"But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject matter, the Legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore, it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith of, a statute, merely because their interest was obvious and their action likely, on the face of the law. What we have said is enough to show that in our opinion the plaintiff never had a contract, and therefore makes it unnecessary to consider the usual power to alter, amend or repeal charters, etc., contained in the Constitution of Michigan (citing cases) or a similar power in the General Railroad Law of 1873, of which the above acts of 1893 and 1897 were amendments through intervening amending acts."

M. G. L. Co. vs. Tax D. of Tenn., 143 U. S., 398.

This case presents exactly the same question under the same charter but under a later law, as was presented in *Memphis Gas Light Company vs. Taxing District of Shelby County, 109 U. S., 398.* The Court followed the same reasoning as in the previous case.

The Railroad Commission cases referred to in the prevailing opin-

ion of the Court below, one entitled *Stone vs. Farmers' L. & T. Co 116 U. S., 307*, were actions brought by the trustee of certain bondholders, secured by a mortgage issued by the Mobile & Ohio R. R. Co., to restrain the carrying into effect of an Act of the State of Mississippi, passed March 11th, 1884, providing for the creation of a commission to supervise freight and passenger rates on railroads. The Railroad Company was incorporated in 1848 by special Acts of the Legislatures of Alabama, Mississippi, Tennessee and Kentucky. The provisions in its charter which the subsequent legislation of Mississippi was claimed to infringe, were Sections 1, 7 and 12, which were contained in the charter from each State. The first authorized the company to transport, take and carry property and persons by power and force of steam, etc. Section Seven,

> "that the directors shall have full power to make and prescribe such by-laws, rules and regulations as they shall deem needful and proper touching the disposition and management of the stock, property, estate, and effect of said company * * * " Section 12, "that it shall be lawful for the company hereby incorporated from time to time to fix, regulate and receive the toll and charges by them to be received for transportation of persons or property on their railroad or way aforesaid, hereby authorized to be constructed, erected, built or used, or upon any part thereof."

By this charter it was claimed that the sole right to manage its own affairs and fix the charges for transportation of persons and property resided in the company and in the company alone. The opinion of the Court enunciated the doctrine that the matter of rates, when not absolutely fixed by the charter without the power of alteration, were subject to the supervision of the State and the charges might be regulated to a reasonable extent, a doctrine which has since been followed by this Court in many cases.

The doctrine to be gathered from all of the above cited cases seems very clearly to be this.

That in the absence of the reserved power to alter, amend or repeal, a special charter or franchise granted to a particular corporation, imposing duties and containing privileges or immunities in regard to a particular thing, when accepted by the corporation, either in writing, if so required by the act or franchise, or accepted by acting

upon the charter or franchise and performing the duties imposed, becomes an inviolable contract and cannot be impaired by the Legislature.

The same is true where under a general act, such as was considered in the Knoop case, a charter is given to all persons choosing to become incorporated under it, and the general act contains privileges and immunities offered to the corporations taking advantage of the act. The mere acceptance of the provisions of the act by any corporation by becoming incorporated under it, constitutes a contract, but where a general statute can be properly construed as a taxation policy statute merely, the State cannot be held to be addressing any corporation or individual by such statute in the sense of making an offer to them which, if accepted and acted upon, will constitute a contract. The true construction of such statutes is to hold them expressions of taxation policy, subject to repeal at any time at the pleasure of the State. Any corporation or individual acting upon the faith of such a statute, does so with full knowledge that the State may at any time change its policy and repeal the statute.

None of these cases, as before shown, touch the question at issue in the case at bar for the reason that here was a franchise granted or one confirmed to a particular corporation, containing a specific exemption and the corporation accepted the provisions of the act by acting upon it and extending its road under it and expending large sums of money upon the faith of the State's promise. This constitutes a perfect consideration as between individuals and it constitutes a perfect consideration as between the state and an individual, as has been said innumerable times in this Court.

It is respectfully urged that the doctrine of these cases answers the suggestion made by Chief Judge Cullen in his opinion reported 182 N. Y., 117.

> "Had, in 1869, instead of the special statute, a general law been passed, exempting railroad companies from contribution towards the cost of repaving the streets, it is clear that such law might have been thereafter repealed and there might be imposed on the company a reasonable and proper tax for the improvement. (Citing Miller case.) Now how does it differ, that instead of a general statute a special law was enacted? In my opinion it only goes to the intent of the Legislature. If I am right in the position that the Legislature could have enacted

the statute of 1869, so far as its provisions are under examination here, without any assent from the Railroad Company, then had the act concluded, 'this statute is passed in the exercise of the powers of taxation and police and not as a grant,' it could not well be contended that the Railroad Company acquired thereby any contract or property right.

"I imagine that a continuous power vested in the Legislature may be exercised and its exercise recalled or modified as well by special legislation as by general legislation, if no provision of the state constitution forbids, which was the case in 1869. If to-day a statute were passed, repealing Section 98 of the present General Railroad Law and enacting that street railroad companies shall not be compelled to pay any portion of the expense of paving the streets within their tracks, will it be denied that subsequently the Legislature might change that policy and impose on the Company the burden of which it had previously relieved them? If this be so, why equally may not the Legislature relieve to-day a particular Railroad Company from that burden and next year reimpose the burden upon it?"

We say to this contention, that the doctrine laid down in the cases cited gives the full and perfect answer to it. Assuming the absence in the Constitution and Railroad Law of any provision to alter, amend or repeal, if the general act were passed repealing Section 98 of the Railroad Law, then within the meaning of the cases cited the Legislature might re-enact it years from now, because there is no contract with the several corporations acting under it.

But we do say that at the time the act of 1869 was passed, there was no general law requiring any street railroad to pave between its tracks or even to repair the pavement between its tracks. This duty was one imposed by special charters or by municipalities acting under powers conferred by the Legislature and the court of appeals always had said that where a franchise was granted to a specific corporation by a city, imposing conditions which were authorized by the Legislature, that it constituted a contract and no one disputes to this day that such is the law. The Act of 1869 imposed duties and regulated the extent of the company's duties in regard to pavements.

The Legislature directly did what it might have required or empowered the municipality to do, and the particular company named in the act accepted the provisions of the act and expended its money in complying with the conditions imposed upon it, and now it is urged

that the Legislature can strike out the consideration for the imposition of onerous duties upon the Railroad Company and continue in force the duties themselves.

II.

NEITHER THE RESERVATION CONTAINED IN THE CONSTITUTION OF THE STATE, NOR THAT CONTAINED IN THE REVISED STATUTES, NOR THAT CONTAINED IN THE ACT OF 1850, AUTHORIZES OR JUSTIFIES THE IMPOSITION BY THE RAILROAD ACT OF THE LIABILITY IN QUESTION UPON THE PROPERTY OF THE DEFENDANT.

(*a*) The reservation contained in the Constitution reads as follows:

> "Corporations may be formed under general laws; but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the Legislature, the objects of corporations cannot be attained under general law."
>
> "All *general* laws and *special* acts passed pursuant to this section may be altered from time to time, or repealed."
>
> *Constitution, Art. VIII., Sec. 1*

It is plain that this reservation refers only to laws authorizing the formation of corporations or to special acts creating corporations, since by express terms it is limited to general laws or special acts passed pursuant to the section in which the reservation occurs.

Now the exemption of the Rochester City & Brighton Railway Company from liability for a permanent improvement was not given by the general law, namely, the act of 1850, under which it was formed, nor does the legislation n question alter or repeal or in any way affect any provision of that act. The charter of incorporation of the Rochester City & Brighton Railway Company being left entirely unaffected by the legislation in question, it is clear beyond all necessity for argument, that the legislation cannot be justified in any sense by the reservation which only applies to alterations or repeals of charters.

As already shown the exemption from assessment for the expense of a permanent improvement of the streets, rests in the contract with the municipality of the city of Rochester confirmed by the Act of 1869. Neither that contract nor the Act of 1869, is a *general* law or a *special* act *passed pursuant to Article VIII. of the Constitution,* which are the only enactments which are made by the reservation in that article subject to alteration or repeal.

So far, therefore, as the contention is made that the legislation in question was authorized by the reservation in the Constitution it is plainly untenable.

(*b*) The Reservation contained in the Revised Statutes has no application to the legislation under consideration. This reservation is as follows:

> "The *charter* of every corporation that shall be granted by the Legislature, shall be subject to alteration, suspension and repeal in the discretion of the Legislature."
>
> *Revised Statutes of New York, 7th Ed. Chap. 18, Title 3 Sec. 8.*

The act, chap. 34 of the laws of 1869, was not an amendment in any sense to the charter of the R. C. & B. R. R. Co. and the general railroad acts do not alter, amend or repeal the Charter of the Rochester City & Brighton Railroad Company. The Charter is left in full force and effect and all the powers possessed by that corporation under its charter have passed to the plaintiff in error unaltered, unamended and unrepealed in any particular.

The general railroad acts do not assume in any degree to deal with the Charter of the Rochester City & Brighton Railroad Company. All that those acts do is to impose a specific liability for a designated permanent improvement upon property of the plaintiff in error. The rights that the general railroad acts affect are not, as we have seen, chartered rights, but contract rights.

(*c*) The reservation of the Act of 1850 relied upon as authorizing the legislation in question reads as follows:

> "The Legislature may at any time *annul* or *dissolve* any incorporation formed under this act, but such dissolution shall not take away or impair any remedy given against any corpora-

tion, its stockholders, or officers for any liability which shall have been previously incurred."

Laws of New York for 1850, Chapter 140, Section 48.

There is not a suggestion in either of the general railroad acts of an annullment or dissolution of any corporation, so it is plain, beyond all question, that the reservation in the Act of 1850 is without force or authority as justifying those acts.

The reasoning under this point and the authorities cited, apply with equal force to the General Railroad Act of 1884 and the revisions of 1890 and 1892. If it be conceded that the New York Court of Appeals has decided in the *Conway Case* that those acts, or some of them, operated to repeal chapter 34 of the Laws of 1869, the power to repeal was not contained either in the Constitution, the Revised Statutes or the General Railroad Act of 1850. It is, therefore, immaterial, so far as this discussion is concerned, whether the contention of the defendant in error is that the alleged repeal was effected by those acts.

(*d*) It is the settled doctrine of the New York State courts and of this Court that the sole effect of a reservation of the right to repeal a charter and of the reservation of the right to alter and amend is limited in the first case to a destruction of the corporate life, and in the second case to the *regulation* and *control* of the affairs of the corporation freed from the restrictions of the Federal Constitution, and that in neither case does it extend to the destruction or impairment of the contracts of corporations or to rights acquired thereunder.

People v. O'Brien, 111 N. Y., 1–44, and cases cited.

In the case cited, the N. Y. court of appeals, speaking through Ruger, Ch. J. says:

"The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life and disable it from continuing its corporate business (*People ex rel Kimball v. B. & A. R. R. Co. 70 N. Y. 569; Phillips v. Wickham, 1 Paige, 590*), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by

the Federal Constitution upon legislation impairing the obligation of contracts. (*Munn v. Illinois, 94 U S. 113, 123.*)

"We think no well considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Chief Justice Marshall in *Fletcher vs. Peck* (*6 Cranch, 87, 135*): 'If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made; those conveyences have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.'

"In speaking of the exercise of this power by Congress in the Sinking Fund Cases, Chief Justice Waite says: 'Congress not only retains, but has given special notice of its intention to retain full and complete power to make such alterations and amendments of the charter as come within the just scope of the legislative power. That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits reduced to possession of contracts lawfully made.

"In *Commonwealth vs. Essex County* (*13 Gray, 239*) Justice Shaw said: 'When, under power in a charter, rights have been acquired and become vested, no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' (*Albany R. R. Co. vs. Brownell, 24 N. Y. 345.*) * * *

"*Greenwood vs. Freight Company* (*105 U. S. 13*), was an action by a stockholder in the Marginal Company against the freight company and others, to obtain an injunction restraining the latter company from taking possession of the railroad tracks of the former after its dissolution by legislative action, and running cars thereon. The Marginal Company had refused to assert its rights, and the stockholder was, therefore, allowed to bring his suit to protect his interest in its property. Judge Miller says in that case: 'Personal and real property acquired by the corporation during its lawful existence, *rights of contract, or choses in action so acquired,* and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such repeal, and the court may, if the legislature does not provide some special remedy, enforce such rights by the means in its power. The rights of the shareholders of such a cor-

> poration to their interests in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.' It was further held that, so far as the law then under consideration authorized one corporation to take and use the property or franchises of another, it was sustainable under the provisions requiring compensation to be made therefor, under the power of eminent domain."

In his dissenting opinion, in the case at bar, Judge Gray said: (Record pages 104, 105) and we quote his words as a part of our argument upon this proposition.

> "There was no reservation of any right to alter the conditions, or to repeal the grant of an exemption, and no such right existed under the Constitution, or in the statutes of the state; for whatever reservation of powers was contained therein related to the alteration, or repeal, of general laws, or of special acts, passed for the formation of corporations; to the alteration and repeal of charters; or to the annulment and dissolution of corporations. (Constitution, art. VIII, sec. 1; R. S. chap. 18, title 3, sec. 8; chap. 140, Laws of 1850, sec. 48.) Such reservations of power did not touch the case of a contract right, which had become property. (*People vs. O'Brien, 111 N. Y. 1, 44; Albany Northern R. R. Co. vs. Brownell, 24 ib. 345.*) This contract, therefore, was not subject to recall, or to modification. The covenant was implied on the part of the government not to invade the rights vested and on the part of the grantee to execute the duties and conditions prescribed in the grant. The government could not do any act to impair the grant without breach of the contract. (*3 Kent, 458; Dartmouth College Case, 4 Wheat. 519; People vs. Sturtevant, 9 N. Y. 273.*) The city and the railroad company regarded this legislation as constituting a contract, inviolable in its provisions, and gave practical construction to it from 1869 to 1897."

Applying the principles of these cases to the case at bar, and it is clear that under neither of the reservations relied upon could the legislature by legislation, which was not intended and which does not purport to be either an amendment, alteration, repeal, suspension or dissolution of the *charter* of the Rochester City and Brighton Railroad Company, deprive it of its property, represented by its contract rights with the municipality of the city of Rochester, and impose up-

on it the expenses of the permanent improvement of the streets as is attempted to be done by the railroad acts.

Certainly the Legislature was powerless to do this if any regard or weight is to be given to well-considered cases in this Court.

In the case of *New Jersey vs. Yard, 95 U. S. 104*, the facts were as follows: By an act of the Legislature of the State of New Jersey passed in 1865, it was provided in substance as follows:

> "That the tax of one-half of one per cent provided by the original incorporation of the Morris & Essex Railroad Company, to be paid by that company to the State whenever the net earnings of the company amounted to 7 per cent upon the cost of the road, shall be paid at the expiration of the first year from the time when the road of the company shall be open and in use to Phillipsburg, and annually thereafter, which tax shall be in lieu and satisfaction of all other taxation or imposition whatsoever, by or under the authority of this State or any law thereof; provided that this section shall not go into effect or be binding upon the company until the company, by an instrument under its corporate seal, filed in the office of the Secretary of State, shall have signified its assent thereto, which assent shall be signified within sixty days after the passage of this act;"

This act contained no reservation of a right to alter, amend or repeal. The company signified its assent as provided by the act. By the subsequent Act of 1873 a more burdensome tax was imposed upon all railroad companies not protected by irrepealable contracts, and the Court of Error of New Jersey held that the Act of 1873 was applicable to the Morris & Essex Railroad Company because the contract of 1865 was repealable by the Legislature of the State, under the clause in the original charter of the corporation in 1835, by which the Legislature reserved "the right to alter, amend or repeal this Act, whenever they thought proper."

This reservation was repeated in a subsequent amendment to the charter, but was not repeated in the Act of 1865. Upon the Writ of Error to this Court it was held that the Act of 1865 and its acceptance by the railroad company constituted a contract which it was beyond the power of the Legislature to repeal without the consent of the railroad corporation. That the reservation of the right to amend, alter or repeal contained in the original charter of the company had no application whatever to the amendment of 1865,

and that it was not the intention of either the State or the railroad company that the contract created by the acceptance of the provisions of the Act of 1865, should fall within the reserved power to alter, amend, or repeal.

Upon this point the Court said:

> "Can it be believed that it was intended by either party to this contract, that after it was signed by both parties, one was bound forever, and the other only for a day? That it was intended to be a part of a contract that the State of New Jersey was, at her option, to be bound or not? That there was implied in it, when it was offered to the acceptance of the company, the right on the part of the Legislature to alter or amend it at pleasure? If the State intended to reserve this right, what necessity for asking the company to accept in such formal manner the terms of a contract which the State could at any time make to suit itself?"
>
> "The language used by the Legislature is inconsistent with the right claimed.
>
> "Which tax (one-half of one per cent) shall be in lieu and satisfaction of all other taxation or impositions whatsoever by or under authority of this State, or any law thereof. Is there here to be implied 'except such laws as may hereafter be enacted?' Such a provision would be to nullify the whole contract. How could the tax be in lieu and satisfaction of all other taxation, if other taxes might be imposed next day? Or, how can it be said to be in satisfaction of all taxes whatsoever under authority of the State, if the State could immediately impose another and more burdensome tax?
>
> "We admit the force of the doctrine, that, when it is asserted that a state has bargained away her right of taxation in a given case, the contract must be clear and cannot be made out by dubious implications.
>
> "But of the existence of the present contract there is no doubt. Its meaning and its terms are clear enough and taken alone, no one denies but that it is a contract which would be protected by the Constitution of the United States. The implication is of a right to revoke it and comes from the other quarter, and is one which we do not think exists by fair construction, and which we do not feel at liberty to import into the contract to defeat its manifest purpose."

The case at bar is quite as strong in its facts as the case cited.

See also *Bank v. Knoop, 16 Wallace (U. S.) 380.*

In a somewhat recent case in this Court of *Stearns vs. Minnesota, 179 U. S., 223*, the question of limitations upon the reserve power to alter, amend or repeal charters as affecting the rights to repeal statutes limiting even the general power of taxation was considered. The case is quite complicated in its facts, which, briefly stated, were as follows:

A statute of Minnesota exempted a certain railroad company from all taxation on lands granted to it for the purpose of the construction of its road, upon payment of a percentage annually of the gross earnings of the railroad, which percentage it was declared should be in full of all taxation and assessment whatever. While this statute was in force the Constitution of Minnesota was amended so as to require, that any law providing for the repeal or amendment of any law, containing an exemption of a railroad corporation from taxation upon its property or real estate, upon payment of a percentage of its gross receipts, should, before it takes effect, be submitted to a vote of the people of the State and be adopted and ratified by a majority of the electors of the State, voting at the election at which the same shall be submitted to them.

Subsequently, in 1895, the Legislature of Minnesota repealed the exempting acts so far as they exempted real estate from taxation, other than that which was used n the actual operation of the railroad. This act of 1895 was under the provision of the Constitution submitted to a vote of the people of the State and ratified by a majority of the electors thereof. It was contended that the original exemption from taxation was a contract, and that the Legislature was without authority to impair its obligation. On behalf of the State it was contended, that the reserve power to repeal exemptions from taxation upon submitting the act effecting such repeal to a vote of the electors, and obtaining its ratification by them, justified and authorized the repealing legislation, and destroyed the previously existing exemptions, as soon as the Act of 1895 repealing that exemption was ratified by the people, under the provisions of the Constitution of Minnesota.

The majority of the court were of the opinion that the exempting act constituted a contract between the railroads and the State which it could not impair. That while that contract when originally made was void, because of a provision in the Constitution of Minnesota that all taxes levied in the State, should be levied upon a cash value

tion of the property taxed, yet the amendment of the Constitution of Minnesota providing for the repeal of such exempting legislation ratified the contract and made it valid. Upon this point the court said:

> "The constitutional amendment of 1871 forbade any change by repeal or amendment of laws respecting the taxation of railroad companies, except upon a vote of the people. The converse of that proposition may be said to be, that by a vote of the people the tax provision concerning railroads might be repealed or amended. But is there no limitation upon the power of amendment? The Law of 1895, adopted by the people, does not release the railroad companies from the burden of paying 3 per cent of their gross earnings into the State treasury, but simply operates to put certain properties belonging to them outside of the protection of that commutation. Was such an amendment within the contemplation of the constitutional provision of 1871? * * * *
>
> "So it may well be said in the case before us, that a contractural exemption of the property of the railroad company in whole, upon consideration of a certain payment, cannot be changed by the State so as to continue the obligation in full, and at the same time deny to the company either in whole or in part, the exemption conferred by the contract."

So, too, in the case at bar it was not competent for the Legislature, by the general railroad acts, to repeal the contract of 1869, or the exemption of 1869 as respects a particular pavement and particular streets, and still leave that contract in force, as it has done, as respects all other streets in the City of Rochester, with the obligation upon the railroad company to make general repairs. The entire obligation of the contract is to-day still in force. Indeed, at the very time the pavements were laid, the expense of which, by the acts in question, is sought to be charged upon the Rochester Railway Company, that corporation was performing to the full its obligation of making general repairs of the street and carrying passengers at the reduced fare and so paying to the City of Rochester the consideration for its exemption from bearing any portion of the expense of a permanent improvement of the street.

What the railroad acts do is to repeal the contract of exemption, leaving still in full force the obligation of the contract on the part of the railroad corporation to make, as respects these very improvements and streets, general repairs and carry passengers at the re-

duced rate of fare provided by the amended ordinance of 1869 or the act of 1869. In other words, precisely what was done in the case of *Stearns vs. Minnesota* (*supra*), and condemned by this Court in that case, has been done and is now being done under the provisions of the acts. It was thought worthy of note in the *Stearns case* to state that the contract in that case had been acquiesced in for thirty years. Upon this point Mr. Justice Brewer remarks:

> "As a preliminary matter, it is worthy of note that the alleged invalidity of this contract, in respect to taxation, was not complained of for thirty years. * * * Both the railroads and the State accepted and acted under it for nearly one-third of a century."

The same is true in the case at bar. The act of 1869 exempting the Rochester and Brighton Railway Company from liability for a permanent improvement, has been acquiesced in both by the State and the City of Rochester up to 1897, a period of nearly thirty years.

In the same case Mr. Justice White, with whom concurred Justices Harlan, Gray and McKenna, said:

> "My understanding does not permit me to doubt that to preserve in this case the contract in its entirety, so far as the rights of the State are concerned, and at the same time to destroy the reciprocal duty owned by the State to the other contracting party, is not to repeal, alter or amend the contract at all, but whilst preserving it, to endeavor by an act of arbitrary power to impose a burden incompatible with the very provisions and terms of the amendatory act. As has been previously said, the consideration of the contract obligation of the corporation to pay the gross receipt tax, was the duty on the part of the State to consider such payment as a discharge of all taxes upon all the real and personal property of the corporation. The agreements being thus independent, are of necessity indivisible, and to retain the entire duty and right of one party to the contract must lead to the preservation of the corresponding and reciprocal right or duty of the other. Under these circumstances, to enforce the amendatory act would necessarily be to deny the corporation the equal protection of the laws since it would leave the corporation subject to taxation, not by the general laws of the State, but by the provisions of a contract, and at the same time subject the corporation to a burden wholly incompatible with its liability under the contract."

In the case of *Duluth & Iron Range Railway Company vs. County of St. Louis, 179 U. S. 392,* it was said of the legislation, after referring to the *Stearns case*

> "Here, as there, to treat the act in question as a repeal, alteration or amendment of the contract, would be to preserve all the obligations of the corporation in favor of the State, and take away from the corporation the consideration on the part of the State, upon which the duty of the corporation to pay the gross receipt tax rests."

So, too, in the case at bar, to consider the railroad acts as a repeal, alteration or amendment of the act of 1869, as respects the exemption from bearing the expense of permanent improvement, is to take away from the defendant the consideration upon which it accepted the obligation to make general repairs, and to carry certain passengers at a reduced rate of fare, and at the same time continue the obligation to make such general repairs. As before stated, the Act of 1890 is not an alteration, amendment or repeal of the Act of 1869, but is simply a violation of the contract and obligation existing between the city of Rochester and the defendant which was confirmed by the Act of 1869.

In the case hereinbefore cited, and lately determined in this Court, *Powers vs. D. G. H. & M. Ry. Co., 201 U. S., 543,* the original company was incorporated in Michigan in 1834, by an Act of the Legislature of Michigan, February 13th, 1855. The Detroit & Pontiac Railroad was authorized to change its name to the Detroit & Milwaukee Railway Company and to purchase all the rights, property and franchises of the Oakland & Ottawa Railroad Company, which had been incorporated under an Act of the Legislature, April 3rd, 1848. Section 9 of the Act of 1855 exempted the corporation from all taxes, excepting one per cent. upon its capital stock. In 1850, the Constitution of Michigan contained the clause which is identical with Section I of Article VIII of the Constitution of the State of New York.

This Court held that the State had not, in its Constitution, reserved the right to alter, amend or repeal the statute granting the exemption.

Upon the argument in the courts below and in the brief of counsel for defendant in error in the courts below great reliance was placed upon the authority of the cases of *Hoge v. Railway Co.* (*99 U. S.*

348), and *Sioux City R. Co. v. Sioux City* (*138 U. S. 898*), as establishing that under a reservation of a right to alter, amend and repeal, it is competent to repeal the exemption from bearing the expense of permanent improvements. A brief examination of those cases will disclose that they are in no sense entitled to the weight given them by counsel.

In the case of *Hoge v. Railway Co.* (*supra*), the reservation relied upon as authorizing the legislation attacked in that case was contained in a statute passed in 1841, and was in the following terms:

> "That it shall become part of the charter of every corporation which shall, at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment or modification thereof, unless the act granting such charter, renewal, amendment or modification, shall in express terms except it, that every charter of incorporation granted, renewed or modified as aforesaid shall at all times remain subject to amendment, alteration or repeal by the legislative authority."

Under this broad reservation the court held that an act incorporating a railroad company in 1856, containing no clause excepting its charter from the provisions of the Law of 1841, *supra*, was subject to the provisions of that act, and its charter liable to alteration, amendment and repeal.

In the case of *Sioux City R. Co. v. Sioux City* (*supra*), the reservation relied upon as authorizing the increased burden was section 1090 of the Code of Iowa, which reads as follows:

> "The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of this title, or whose organization may be adopted or amended hereunder, shall at all times, be subject to legislative control, and may be, at any time, altered, abridged or set aside by law, and every franchise obtained, used or enjoyed by such corporation may be regulated, withheld or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good."

Under this broad reservation it was held that a resolution of the City Council of Sioux City requiring the company to pave between its tracks, did not prevent the Legislature from placing upon the railroad

company the additional burden of paving one foot outside of its tracks. It was rightly so held too, because of the provision in the reservation which subjected all corporations to the imposition of such conditions upon the enjoyment of their privileges as the general assembly shall deem necessary for the public good.

No such reservation or power exists in the case at bar, as was the subject of consideration in the case of *Hoge v. Railway Co.* (*supra*), or of *Sioux City . Co. v. Sioux City* (*supra*). The defendant in this case relies upon a resolution of the Common Council which, confirmed by the Legislature, under the decisions of the State of New York, constitutes a contract, and which, under the decision of this Court in *Chicago v. Sheldon* (*supra*), and other cases, constitutes a contract; and also upon an act of the Legislature of the State of New York confirming that contract, namely, the Act of 1869, and also upon the long acquiescence of both the city of Rochester and the State in the binding obligation of that contract.

A very different question would arise if there existed in the case at bar the broad reservation contained in the *Sioux City* and the *Hoge Cases* (*supra*), of the right to alter, amend or repeal and impose further conditions, and if, in the case at bar, as in those cases, the State had itself never taken any action confirming the exemption.

It is confidently submitted therefore, that neither the *Hoge Case* nor the *Sioux Case* are authority in support of the legislation, contained in the railroad acts as construed by the Court of Appeals.

III.

THE COURT ERRED IN HOLDING THAT EVEN IF THE ACT OF 1869, TOGETHER WITH THE ORDINANCES OF 1862 AND 1869, CONSTITUTED A CONTRACT, IT WAS PERSONAL TO THE ROCHESTER CITY & BRIGHTON RAILROAD COMPANY, AND DID NOT PASS TO THE PLAINTIFF IN ERROR, UNDER THE LEASE, FOLLOWED BY THE MERGER, MADE PURSUANT TO THE PROVISIONS OF THE ACT OF THE LEGISLATURE OF THE STATE OF NEW YORK, CHAPTER 254 OF THE LAWS OF 1867 AND CHAPTER 503 OF THE LAWS OF 1879, THE LATTER ACT AMENDING THE ACT OF 1867.

The Court will observe, by the record, page 42, finding 15, that

the plaintiff in error was incorporated pursuant to the provisions of Chapter 252 of the Laws of the State of New York for the year 1884. Section 1 of that Act provided for the incorporation of street railroad companies, and Section 9 of the Act provided for keeping in permanent repair certain portions of the streets in which its tracks were laid, which Section has been quoted at length at page 11 of this brief. Section 18 of the Act contained this provision, which so far as is pertinent here, was as follows: "Nothing in this Act * * * shall interfere with or repeal or invalidate any rights heretofore acquired under the laws of this State, by any horse railroad company, or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road, in accordance with the terms and provisions of its charter * * *"

On the 25th day of February, 1890, the Rochester City & Brighton Railroad Company executed and delivered to the defendant, a lease of all its property, franchises, rights and privileges, of every kind and description, for the unexpired term of its charter, which lease was duly executed and approved by the stockholders of both companies, according to the Laws of the State of New York.

(Record, page 44, Finding 16).

That afterwards, and in the same year, the plaintiff in error acquired all of the capital stock of the Rochester City & Brighton R. R. Co., and duly filed its certificate pursuant to the provisions of the merger acts.

(Record, page 44, Finding 17).

The Court of Appeals of the State of New York had settled the doctrine, that a company organized under Chapter 252 of the Laws of 1884, leasing all the property, rights and franchises of another railroad company, organized under a prior Act, held the franchise of the lessee as lessor, and operated such franchise by virtue of the lease, and not by virtue of the powers conferred upon the lessor company by the provisions of that Act, excepting so far as it was made a railroad corporation.

Gilmore vs. City of Utica, 121 N. Y., 561.

Pending negotiations for the lease, the Rochester City & Brighton Railroad Company had applied to the Common Council of the City of Rochester for leave to change its motive power from horse to electricity.

(Record, page 41, Finding 12).

The Common Council granted such application upon certain conditions, and prescribed that the Rochester City & Brighton R. R. Co. should, by resolution, accept the grant from the Common Council, and execute and deliver a contract to abide by such resolution, and such contract was executed and delivered by the Rochester City & Brighton R. R. Co. to the City on the 25th day of February, 1890, and duly approved by the City Attorney.

(Record, page 41, Finding 12).

That contract is annexed to the answer.

(Record, page 19, Ex. B).

After prescribing certain conditions, upon which the change should be made, and prescribing for a five cent fare from any one point in the city to any other point, and for the payment of a certain percentage of the gross receipts, the resolutions adopted by the Common Council and recited in the contract, provided:

> "It is further resolved, that before this grant and consent shall become operative, the said Company shall deliver to and leave with said Committtee, a written agreement with the City, to accept, and in each and every thing and particular, comply with each and all the provisions contained in these resolutions * * * * and to well and truly, at all times, comply with all ordinances and resolutions of the Common Council of said city, not in conflict herewith, which have been at any time heretofore, or may at any time hereafter be passed relating to the rate of speed, the manner of running cars, general government or use of tracks, removal of ice, snow or dirt, and the *general repairs of the streets* within and for two feet outside and adjoining said Company's track or tracks * * * "

It will thus be seen that the City in this contract expressly adopted the construction of years standing, that the Railroad Company was to make *general repairs,* and not new pavements.

Thereafter the lease was executed and the merger effected and the plaintiff in error applied to and obtained from the Board of Railroad Commissioners of the State of New York, its consent to the change of motive power.

(Record, page 45, Finding 18).

This being the situation, it becomes necessary to examine the question which was determined against us by the majority opinion

delivered in the Court of Appeals, whether the exemption granted to the Rochester City & Brighton R. R. Co., by the Act of 1869, from making new pavements, passed, under the lease and the merger, to the plaintiff in error, as to those streets in which the Rochester City & Brighton R. R. Co. obtained its franchise and constructed its road prior to the passage of Chapter 252 of the Laws of 1884. The question as to whether that exemption applied to extensions made subsequent to the passage of the Act of 1884, having been expressly waived by the plaintiff in error in the contract entered into by it with the defendant in error, in the year 1901.

(Record, page 53, Finding 27).

(Second and third paragraphs of the agreement, page 55.)

The Court's attention is respectfully directed to the first of the merger acts, Chapter 254 of the Laws of the State of New York for the year 1867 and to Chapter 503 of the Laws of 1879 amending the Act of 1867. The Court will bear in mind that Chapter 254 of the Laws of 1867 was in force when the Act of 1869 was passed, and the legislation of 1869 was passed in view, presumably, of the existence of Chapter 254 of the Laws of 1867.

The Amendment of 1879 did not alter to any extent the provisions of the original act. The act as it originally stood provided then, as now, that where a railroad was held under a lease it might take the transfer of the capital stock of the stockholders, or any of them, in the corporation whose road was held under lease and in addition exchange its own capital stock, and when the greater part of the capital stock had been so surrendered the directors of the corporation taking the transfer should become exofficio the directors of the lessor and then continued as now,

> "and whenever the whole of the said capital stock shall have been so surrendered or transferred and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation, to whom such surrender or transfer shall have been made, the *estate, property, rights, privileges, and franchises* of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in and be held and enjoyed by the said corporation to whom such surrender or transfer shall have been made, as fully and entirely and without change or diminution, as the same were before held and enjoyed and be managed and controlled by the board of directors

of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation."

The act then provides for the protection of existing creditors.

The Court's attention is called to the sweeping language of this act. It not only vests the property and franchises but the rights and privileges as distinct from property and franchises.

Prior to the passage of the Act of 1867, one railroad corporation could not own the stock of another. Surely if all the stockholders of the R. C. & B. Railroad Company had transferred all of their capital stock to an individual or individuals, the owners of the capital stock would have held everything that the other stockholders possessed and in case of the winding up of the corporation, would have received all of its assets.

Now the Act of 1867 authorized a railroad corporation to hold all of the capital stock of another railroad corporation, and the statute provided what should be the result. The merging corporation was to hold everything the same as it had theretofore been held by the lessor company. Its directors were to become the directors of the lessor corporation and manage the corporation. There was no *sale* of the property contemplated, that passed as incident to the transfer of the stock and there was no consolidation of the two corporations.

The merging company, the plaintiff in error, took everything which the lessor had by the same title and to the same extent as any stockholder purchasing the entire stock would take it, only the merging company took title to all the property, privileges, etc., as well as to the stock. That *everything* was to pass to merging company was clearly the legislative intent. Each corporation continued in life, the lessor corporation, although it had parted with all its property, as well as the lessee corporation which acquired it. This proposition was distinctly held by the Supreme Court of the State of New York in the matter of *N. Y. E. Co., 43 State Reporter, 651*, unanimously affirmed in the Court of Appeals, 133 N. Y., 690.

This distinction must necessarily be borne in mind in examining the several cases referred to and relied on by the majority of the Court, below in arriving at the conclusion that the contract, if one

existed, was personal to R. C. & B. road and did not pass by the merger.

The several cases which it is desired to digest and bring to the attention of the Court are of three different kinds. *First,* where it was claimed that the exemption from taxation passed to another company under a foreclosure sale; *second,* where there was a consolidation of two corporations, one holding an exemption from taxation, into a new corporation, taking its life under existing law and it was claimed that the exemption passed to the new corporation; and *third,* where, as in the case at bar, there was a merger of one corporation holding an exemption from taxation into another existing corporation, authorized to merge it, and the claim made that the exemption from taxation contained in the charter or franchises of the company merged, passed to the merging company.

The leading case under the first subdivision of cases is *Morgan vs. Louisiana, 93 U. S., 217.*

In this case a railroad company was incorporated by a special act of the Legislature of Louisiana, passed in April, 1853, for the purpose of constructing a railroad from New Orleans to a certain point touching various point of importance.

The act provided that the capital stock of the company should be exempt from taxation and that the "works, fixtures, workshops ware-houses, vehicles of transportation and other appurtenances of the Company" should be exempt from taxation for ten years after the completion of the road, within the limits of the state, and that the president, engineer, clerks, agents and servants of the Company should be exempt from jury duty and military duty, except in case of invasion or insurrection. By subsequent acts, the company was authorized to borrow money and secure it by a mortgage on the *property and franchises of the Company,* no other words were used. The road was never completed, as provided in its charter. The mortgage was foreclosed and the property was sold under a decree granted in the foreclosure suit and executions issued upon certain judgments recovered by creditors of the Company, and the property was sold to an individual, not to any other corporation.

Nor does it appear that the individual proposed to incorporate another Company to comply with the provisions of the charter or to do ought except to tear up the rails and ties and sell them, sell

the locomotives and rolling stock to whoever would buy. The question was, whether under this foreclosure and judgment sale, under the descriptive words of "property and franchises," the privilege consisting of an immunity from taxation, passed to the purchaser. The court's reasoning in the forepart of the opinion is devoted to showing that the whole purpose of the act was to make the exemption personal to the road itself and argued that surely the president, engineers, clerks, agents and servants of the company could not well claim to be exempt from jury duty after the road went out of business. But the main contention of Justice Field was, that the language, "property and franchises" did not include the exemption from taxation. The mortgage was, therefore, not a lien upon the exemption and nothing passed under the sale.

In the opinion he said:

> "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to to the term 'franchises.' It is often used as synonomous with rights, privileges and immunities, though of a personal and temporary character, so that if any one of these exists it is loosely termed a 'franchise' and is supposed to pass upon a transfer of the franchises of the Company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel * * they are positive rights or privileges without the possession of which the road of the Company could not be successfully worked.
>
> "Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer without express statutory direction." Again, in conclusion the court says, "Immunity of particular property from taxation is a privilege which may sometimes be transferred under that designation, as held in (citing cases). All that we now decide is that such immunity is not itself a franchise of a railroad corporation which passes as such, without other description, to a purchaser of its property."

And we say, following this decision, that the privilege of immunity from taxation, general or special, while it may be incapable of transfer without express statutory direction, we have under the merger act, express statutory direction that all the rights, privileges and franchises and property should pass. Immunity from taxation certainly is a privilege, even if not a part of the franchise.

L. & N. R. R. Co. vs. Palms, 109 U. S., 244.

In that case it is clear that under the act of the Legislature in the State of Florida, passed in 1881, certain taxes were imposed upon the railroad corporation, extending from the City of Pensacola, in the State of Florida, to the north boundary. The validity of the statute was questioned, as being repugnant to the federal constitution. It appears that a company was incorporated under the provisions of the general act of the State of Florida, passed in 1855. The eighteenth section of the act provided,

> "The capital stock of any Railroad Company accepting the provisions of this act, shall be forever exempt from taxation and the roads, their fixtures and appurtenances, including workshops, warehouses, vehicles and property of every description needed for the purpose of transporation of freight and passengers, or for repair and maintenance of the roads, shall be exempt from taxation while the roads are under construction and for the period of thirty-five years from their completion."

Then follows provisions exempting servants and officers from jury or militia duty.

It appeared that the Alabama & Florida Railroad Company accepted the provisions of the act, although incorporated prior thereto and built a line of railroad, bringing it within the benefits and privileges of the act. It gave a mortgage and its rights, privileges and franchises were sold and conveyed to one, A. E. Maxwell, his heirs and assigns, in trust, and by him were sold and conveyed December 10th, 1872, to the Pensacola & Louisville Company, a corporation created by the laws of Florida. The last named company was reorganized by an amendatory act, which took effect February 4th, 1872, the 18th Section of which recited that it having become the assignee of the Alabama & Florida Company, and the franchises of that company, and being in possession of and operating

the said line of road, that it should have the same exemption from taxation that the said Alabama & Florida Railroad Company had.

The railroad franchise of this company was sold under a foreclosure to the Pensacola Railroad Company, which was organized by special act, February 27, 1877. It was provided in the act incorporating it and it was authorized to acquire by purchase and assignment, all the property, rights, franchises, privileges and immunities of the Pensacola & Louisville Railroad Company. It appeared that by the Thirteenth Section of the Act of 1872, amending the charter of the Pensacola & Louisville Railroad Company, that "it shall be lawful for said company to purchase, lease, acquire an interest in, to unite or consolidate with, lease or sell any other Railroad Company in or out of the State and to make the same one company."

Under these several provisions the Pensacola Railroad Company conveyed to the plaintiff the railroad in question, together with all its rights, privileges, easements and immunities. Upon this state of facts, this Court, speaking through Mr. Justice Mathews, held that the exemption from taxation, created by the Eighteenth Section of the Internal Improvement Act of 1855, under which the original company was incorporated, was a personal privilege, and was not assignable except by authority of some statute, following the construction put upon the same language in *Morgan vs. Louisiana.*

This conclusion was arrived at by referring to the Eighteenth Section of the Act of February 4th, 1872, amending the Charter of the Pensacola & Louisville Railroad. That section was cited. The last named company having become assignee of the Alabama & Florida Railroad Company, and all of its franchises and property, which corporation was exempt from taxation for a limited period, the said Pensacola & Louisville Railroad Company, and its property, now owned or hereafter to be acquired, was also exempted from taxation during the remainder of said period.

The Court in the first part of the opinion held that if the exemption from taxation had passed with the sale, it was unnecessary in the Act of February 4, 1872, to confer by legislative act, the same exemption upon the purchaser of the property. Then referring to the Act of 1877, incorporating the Pensacola Railroad Company, by which it was authorized to acquire by purchase and assignment, all

the rights, property, franchises, privileges and immunities of the Pensacola & Louisville Railroad Company, the Court held that this language was broad enough to cover the assignment and transfer of the immunity from taxation granted to the Pensacola & Louisville Railroad Company by the Eighteenth Section of its Charter. But the Court in its opinion also said, that this was a privilege personal to the Pensacola & Louisville Railroad Company and consequently did not pass to the plaintiff through the mesne conveyance from the Pensacola Railroad Company.

The Court explained its position as follows:

> "The title of the plaintiff in error, therefore, to the exemption claimed must be supported by some other authority. This is claimed to be found in the general power given by the Thirteenth Section of its Chater to the Pensacola & Louisville Railroad Company to lease or sell to or consolidate with any other Railroad Company, in or out of the State, which power passed with others to the Pensacola Railroad Company by the Second Section of its Charter. But as we have already seen and as was decided (citing *Morgan vs. Louisiana, Wilson vs. Gaines*) the exemption from taxation does not pass by virtue of a conveyance of the *railroad and its franchises*, which was all the Pensacola Railroad Company could pass under that authority, but requires for its transfer some particular and express description, indicating unequivocally the intention of the Legislature that it might pass by an assignment."

The Court then proceeds to show that under the Constitution of the State, which took effect in 1868, and which expressly provided that the property of all corporations, whether heretofore or hereafter incorporated, shall be subject to taxation, unless such corporation be for religious, educational or charitable purposes, overrode the Charter of the Pensacola & Louisville Railroad Company in 1872, and the Charter of the Pensacola Railroad Company in 1877.

Neither of them could take an immunity forbidden by the Constitution, because they were new corporations, incorporated after the constitutional provision took effect, and so incapable of holding any immunity from taxation, and consequently neither of them was able to convey any title to immunity from taxation to the plaintiff.

Chesapeake & Ohio R. R. Co. vs. Virginia, 4 Otto 718.

The headnote of that case is,

> "Where the statute which authorizes the consolidation of two companies declares that the consolidated company shall possess all the rights and privileges which each of the companies enjoyed under its charter, those rights and privleges of each do not extend beyond that portion of the aggregated property which each had held under its charter."

It appeared that in 1866 the Legislature of Virginia passed an act authorizing the incorporation of the Covington & Ohio River Railroad. The State having been divided a few days after, the Legislature of West Virginia passed a similar act, similarly entitled. The seventh section of the act provided, "No taxation upon the property of said company shall be imposed by the state until the profits of the company shall amount to ten per cent. a year on its capital." The ninth section provided for the appointment of five commissioners, to be appointed by each state to procure persons to furnish the necessary capital and incorporate under the act. The corporation was never formed.

In 1867 the legislatures of both states, passed an act to provide for the completion of a line or lines of railroad from the waters of the Chesapeake to the Ohio River. The acts provided that if the Covington & Ohio Railroad Company should be organized, it might consolidate with three other companies named, into one corporation known as the Chesapeake & Ohio Railroad corporation. The second section gave to the consolidated company, in case the consolidation should be effected, all the rights, privileges, franchises and property which might have vested in either company prior to the act of consolidation. The act further provided that one of the railroad companies named in the act, Virginia Central, might contract with the Chesapeake & Ohio R. R. Commissioners for the construction of a railroad from Covington to the Ohio River, and in case such contract should be made the said Virginia Railroad Company should be known as the Chesapeake & Ohio Railroad Company "and shall be entitled to all the benefits of the charter of the Covington & Ohio Railroad and to all the rights, interests and privileges which by this act are conferred upon the Chesapeake & Ohio Railroad Company when organized."

The consolidation first proposed never took place. The second was accepted. The Virginia Central did enter into the contract au-

thorized by the act and became the Chesapeake & Ohio, and undertook to construct the unfinished road.

"Thus the contract between the state and the company was formed and such were its terms. The question now is, how far did the contract exempt the property of the Virginia Central (now the Chesapeake & Ohio) Company from taxation, or rather what property did it exempt."

The court then goes on and determines that the Virginia Central was entitled to the same exemption as to its property that the Covington & Ohio Railroad Company would have had it become incorporated. That this right passed to the Cheapeake & Ohio Railroad as to the property which it acquired from the Virginia Central. But the property of the Virginia Central which was exempted from taxation was only such property as would have been exempted had the Covington & Ohio Railroad Company been incorporated and constructed the line of road contemplated by its charter. As to that line of road thereafter constructed by the Virginia Central, the exemption applied, but it did not apply to additional lines constructed by the Virginia Central, which the Covington & Ohio would not have been authorized under its charter to construct had it come into being. Up to that extent the Chesapeake & Ohio was entitled to the exemption.

Chesapeake & Ohio Ry. Co. vs. Miller, Auditor of the State of West Virginia, 114 U. S., 176.

The Chesapeake & Ohio Railway Company, which the Court should bear in mind was the successor of the Chesapeake & Ohio Railroad Company, which was the plaintiff in error in the case just previously cited, claimed exemption from taxation under the same Act of 1866, which authorized the incorporation of the Covington & Ohio Railroad Company. The first company, named Chesapeake & O. R'way Co., pursuant to a statute of the State of West Virginia, mortgaged its property and franchises, its property was sold in 1877 to purchasers, who in pursuance of the statute then in force, became the corporation under the name of the Cheapeake & Ohio Railroad Company, which was the plaintiff in error in the last case. The statute under which the proceedings were conducted, provided that if a sale be made under the deed of trust or mortgage executed by the railway, and

there be a conveyance, such sale should pass to the purchaser not only the works and property of the company but any works which the company may have after that time and before the sale have constructed, and all other property of which it may be possessed at the time of the sale. "Upon such conveyance to the purchaser, the said company shall *ipso facto* be dissolved. And the purchaser shall forthwith be a corporation by any name which may be set forth in said conveyance."

The Second Section of the Act provided, "The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had, or should have been performed by the first company. * * * "

Mr. Justice Matthews, delivering the opinion of the Court, said

> "that the Chesapeake & Ohio Railroad Company, by virtue of its organization as a corporation under the Act of March 1st, 1866, became entitled to the exemption from taxation secured by the Seventh Section of that Act, and that as a matter of contract, is not denied or disputed. Whether the Chesapeake & Ohio Railway Company succeeded to that right and immunity is the question to be determined."

Justice Matthews then pursues the same line of reasoning as in the *Palms* case, *109 U. S., 244,* and upon the authority of *Morgan vs. Louisiana,* states that the language used in Section 2 of the Act providing for the conveyance under foreclosure, of the properties of the corporation, is not sufficiently broad to include an immunity from taxation.

But in the second part of the opinion it was stated that conceding the words were broad enough to pass the exemption from taxation to the plaintiff in error, the plaintiff in error was a new corporation, taking its life under existing laws by virtue of the identical act which provided that it might become a corporation and which dissolved absolutely the existing corporation. That being so, it is stated by the learned Court, "All grants of corporate powers, rights, privileges, franchises and immunities are taken subject to existing laws, remaining unrepealed."

The Court then proceeds to show that at the time the plaintiff became a corporation, the Code of West Virginia of 1869 was in force, which provided as follows: "And the right is hereby reserved to the

Legislature to alter any charter or certificate of incorporation hereafter granted to a joint stock company, and to alter or repeal any law applicable to such company."

The Constitution of the State of West Virginia of 1863 was in force. Section 5 of Article 11, of which provided,

> "The Legislature shall pass general laws whereby any number of persons associated for * * * may become a corporation * * * and no special act incorporating or granting peculiar privileges to any joint stock company or association * * * shall be passed. * * * No charter of incorporation shall be granted under such general laws, unless the right be reserved to alter or amend such charter at the pleasure of the Legislature, to be declared by general laws."

The Court then states that the incorporation of the plaintiff in error comes within the provisions both of the Constitution and the Code.

> "Its charter is the Law of 1871, as amended by that of 1877. Its certificate of incorporation is the conveyance to it, by the name it has chosen, as a purchaser at the judicial sale, or set forth in some writing signed by such purchaser and recorded as required. It is a charter granted under a general law, which the Constitution declares to be subject to legislative alteration and amendment."

How many members of the Court concurred in the construction placed by Justice Matthews on the language of the act, authorizing the sale, we do not know. It is clear, however, that the second ground of the opinion, within all the decided cases, was conclusive against the plaintiff in error.

Wilson vs. Gaines, 103 U. S. 417.

In this case the head note perhaps sufficiently states the gist of the case.

> "A judicial sale of the property of a railroad company under a lien does not necessarily carry with it to the purchaser any immunity from taxation which the property enjoyed in the hands of the original company. Mere general words of description are not sufficient to extend a sale beyond the subject matter of the

> lien, as defined by the statute, which lies at the foundation of the entire proceedings."

It appeared that the Nashville & Chattanooga Company was incorporated under a special act passed December, 1845, in Tennessee. The thirty-eighth section of the charter provided,

> "That capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including work-shops, ware houses and vehicles of transportation, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer."

In 1852 another corporation was incorporated, the Edgefield & Kentucky R. R. Co. Section 6 of the charter of which gave it all the powers, rights and privileges and subjected it to all the liabilities and restrictions conferred and imposed on the Nashville & Chattanooga Railroad Company. By an act passed in the same year, the governor of the state was authorized to issue to certain railroad companies, bonds of the state for the purpose of aiding the completion, and it was provided that upon such issue and the completion of the road, the State should

> "be invested with a lien, without a deed, from the company, upon the entire road, including the stock, right of way, grading, bridges, masonry, iron rails, spikes, chairs and the whole superstructure and equipments, and all the property owned by the company, as incident to or necessary for its business, and all depots, depot-stations for the payment of all said bonds issued to said company, as provided in this act."

The Edgefield & Kentucky Railroad Company availed itself of this act and subjected its property to statutory lien. In 1870 the Legislature passed an act, providing that a bill of foreclosure might be filed in the Court of Chancery on behalf of the state, providing for the foreclosure of the bonds and the sale of the property. Section 10 of that act provided

> "that upon the sale of any of the franchises of either of the railroad companies * * * under the provision of this act, all the rights, privileges and immunities appertaining to the franchise so sold under its act of incorporation, and the amendments thereto, and the general improvement law of the state, and acts

amendatory thereof, shall be transferred to and vest in such purchaser."

Under the bill filed, the property was sold to the St. Louis & Southwestern Railroad Company. Its receiver filed a bill to enjoin the collection of taxes levied upon that part of its road formerly owned by the Edgefield & Kentucky Road. The court in its opinion refers to Morgan vs. Louisiana and reiterates the doctrine that immunity from taxation is a personal privilege and not transferable, "*except with the consent or under the authority of the Legislature which granted the exemption, or some succeeding Legislature.*" Then the court uses the following language,

> "In the present case the lien of the state was put by the statute only on the property of the company. It did not even, in express terms, include the franchises which were necessary to the operation of the road. Under such circumstances, if there were nothing more it would seem to be clear beyond all question that a sale under the lien would not necessarily carry with it any immunity from taxation which the property enjoyed in the hands of the original company."

It appeared and was contended, that the bill alleged that the road, its franchises, property, rights, privileges and immunity were sold and that that allegation was admitted by the demurrer. The court said in regard to this,

> "This averment must be taken in connection with the further equally distinct statement in the bill that the sale took place under proceedings instituted in the Chancery Court of Nashville 'to foreclose the state's statutory lien' and as that lien was confined to the 'property owned by the company, or incident to, or necessary for, its business,' we will not, in the absence of a particular and positive allegation to the contrary, presume that more was sold than the lien covered."

The court then distinguishes the case from another case decided by the Supreme Court of Tennessee under the same statute, which held "that not only the property of the old company, but all its rights, franchises, privileges and immunities, as defined by the charter and laws, and the decree in the cause, passed to and vested in, the new company." The court then proceeds to say that nowhere in the case is it

stated that anything further was sold than what was covered by the lien under the act of 1852 and, therefore, the court in conclusion says, "It would be against all the settled rules of construction to hold, upon the face of the statute alone, that more was sold than the lien to be adjudicated upon implied."

These are all of the cases where the court has passed upon the question as to whether an immunity from taxation passed under a foreclosure sale. At least they are all those cited in the prevailing opinion and one or two besides.

Counsel for plaintiff in error now desire to take up that line of cases cited in the prevailing opinion and a number of others, where there was a consolidation of two existing corporations into a new one, and the reasons given by the court why an exemption from taxation did not pass to the new company or did pass.

Shields vs. Ohio, 95 U. S. 319.

This is the leading case laying down the doctrine that where two corporations are consolidated, one of them holding certain privileges and immunities in the way of exemption from taxation, and the corporations are both dissolved and a new corporation springs into existence, the new corporation is subject to the existing laws, and if the existing laws forbid the enjoyment of the exemption or special privileges theretofore enjoyed by either of them, the new corporation does not take. Certain railroads, among them the Junction Railroad Company, were consolidated in April, 1869, under the name the Lake Shore & Michigan Southern Railway Company. By the Charter of the Junction Railroad Company, passed in 1846, the Eleventh Section empowered the Company to charge such tolls for the transportation of freight and passengers as it might deem reasonable. The Constitution of Ohio took effect in 1851, and declared: "No special privileges shall ever be granted that may not be altered, repealed or revoked by the General Assembly." In 1873 the Legislature of Ohio passed an act fixing the rate of fare for passengers on all railroads, as not exceeding three cents per mile. The Court held, that the consolidated railroad took all its powers subject to the constitutional provision of 1851, which permitted the Legislature to alter or amend any special privileges, and the consolidated corporations being dissolved, and the new

corporation coming into life, all of its rights and franchises became subject to the provisions of the existing Constitution.

St. L. I. M. & S. Ry. Co. vs. Berry, 113 U. S., 465, is a case where the same doctrine is laid down. The Cairo & Fulton Railroad Company by the Act incorporating it, in 1853, possessed a privilege which was, that its property should be forever exempt from taxation. The Constitution of the State, adopted in 1868, declared, that "the property of corporations now existing or hereafter created shall forever be subject to taxation the same as property of individuals." Under an Act of the Legislature of the State of Arkansas, passed in 1868, the Cairo & Fulton Railroad Company and other railroads became consolidated under the name of plaintiff in error. The Court held that the new corporation became subject to the provisions of the new Constitution, which prevented it from taking this special exemption. The language of the Court upon this subject is very clear, it being urged that the act of consolidation having been made in pursuance of the Charter of the Cairo & Fulton Railroad Company, it was exercising a right secured to it by contract. The Court said,

> "Construed in the most liberal spirit in favor of the company, it cannot be extended beyond a stipulation on the part of the State that the Cairo & Fulton Railroad Company may at any time thereafter, by consolidation with any other railroad company, form and become a new corporation with such powers and privileges as at the time when the offer is accepted and acted upon, may then be in the power of the State to confer, and lawful for the new corporation to accept. If acted upon before the law was changed, it might well be that all the powers and privileges originally conferred in the Charter of the Cairo & Fulton R. R. Co., including the exemption in question, would have vested in the new company. But it was not accepted and acted upon until a change in the organic law of the State forbade the creation of corporations capable of holding property exempt from taxation, it must be presumed that when the original company entered into the consolidation, it did so in full view of the existing law."

Maine Central R. R. Co. vs. State of Maine, 96 U. S., 499.

The doctrine of this case is exactly similar to that of the last two.

Two railroad corporations, incorporated by a special act, in the Charter of each of which was a clear limitation upon the power of the State to tax, became consolidated under an Act of the Legislature, the effect of such consolidation being to wipe out the corporate existence of each of the two consolidating companies, and create a new.

The decision of the Court is stated in Subdivision 3 of the head note: "A new corporation formed by the consolidation of two others, held to be subject to the provisions of the General Law of Maine, which declares that any act of incorporation, subsequently passed should at all times thereafter, 'be liable to be amended, altered or repealed at the pleasure of the Legislature,' " and although the consolidated acts conferred upon the new company "all the *powers, privileges* and *immunities*" possessed by each of the consolidating companies; nevertheless, the new corporation, taking its powers by virtue of the statute in existence at the time it came into life, became subject to the General Law permitting the alteration or amendment of its Charter.

In this case the Court directly approves and distinguishes certain cases which will be hereinafter cited.

Railroad Company vs. Georgia, 98 U. S., 359.

The doctrine of this case is the same as that of the preceding. Where two Railroad Companies, prior to 1863, each enjoying a limited exemption from taxation, and were consolidated by an Act of the Legislature of the State of Georgia, of 1863, which conferred upon the consolidating companies full corporate powers and continued to it the franchises, privileges, and immunities which the companies had held by their original charters. The court held that by the consolidation, the new corporation was created and the original companies dissolved; that the new corporation became subject to the provision of the existing code, which reserved the right of the Legislature to withdraw its Charter, or to change, modify or destroy it, and hence, that a subsequent act withdrawing the exemptions, did not violate the provisions of the Constitution.

We desire to call the Court's attention to the language of the Court in delivering the opinion which clearly distinguishes the case at bar;

"The consolidation provided for was clearly not a merger of

one into the other, as was the case of *R. R. Bkg. Co. vs. Georgia, 92 U. S., 665.* Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. * * * Looking thus at the legislative intent, appearing in the Consolidation Act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from an union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result."

The N. & W. R. R. Co. vs. Pendleton, 156 U. S., 667.

In this case, certain corporations whose special charters empowered them to fix their own charges, became consolidated under a law of the State of Virginia, passed in 1870, under the name of the Atlanta, Mississippi & Ohio R. R. Company. The act of incorporation entitled the last named company to acquire all the property and franchises of the several railroads possessing the powers mentioned. It did acquire them. The Act of 1870 authorizing the formation of the A. M. & O. R. R. provided that it should be vested with all the rights and franchises of the several railroad companies, but another section of the Act provided that the company itself should be subject to all the laws of the commonwealth, among which was an Act passed in 1853, which permitted the State of Virginia to regulate the tolls upon railroads.

A mortgage upon the property of the A. M. & O. R. R. Company was foreclosed and the property and franchises sold to the plaintiff in error, which was a railroad corporation. The court held that the A. M. & O. R. R. Company, created in 1870, was created subject to the provisions of the Act of 1853, which, by its own charter, applied to it, and that law being in existence, was hostile to any right which might have been held by either of the companies whose property and rights it acquired. Justice Shiras, delivering the opinion said:

"If the original companies did have a contract with the State

whereby, until a certain amount of the money should be earned, they should have the right to fix and regulate their charges, it is clear that the A. M. & O. R. R. Company accepted their charter with a distinct provision that the company should be subject to the general laws of the commonwealth, one of which was the very law, then and still in force, which prescribed the tariff of rates endorsed in present suits.

It is equally obvious the the Norfolk & Western R. R. Co., the plaintiff in error, by becoming the legal successor to the A. M. & O. R. R. Co. was brought within the scope of those general laws and cannot successfully claim immunity under the charters of the previous companies."

In the following part of the opinion, the court enunciates and clearly defines the extent of the doctrine laid down in the Morgan case, the Wilson case and Cheapeake & Ohio case:

"We have frequently held that in the absence of express statutory direction, or of an equivalent implication by necessary construction, provisions, in restriction of the right of the state to tax the property or to regulate the affairs of its corporations, do not pass to new corporations succeeding, by consolidation or by purchase under foreclosure, to the property and ordinary franchises of the first grantee; that a mortgage of the franchises and property of a corporation made in the exercise of a power given by the statute, confers no rights upon purchasers at a foreclosure sale to exist *as the same corporation*, but to reorganize a new corporation, subject to the laws *existing at the time of the reorganization.*"

The whole doctrine of this case and of the cases preceding it, is based upon the theory, not that the exemption will not pass to a new company, if proper words of transfer are used in a statute permitting the transfer of the property, franchises and rights of a corporation; but that a new corporation, taking the property, rights and franchises and deriving its life under existing laws, must take those rights and franchises limited by the laws in force at the time the new corporation comes into life, and if those laws are hostile to the particular privilege or immunity, the new company is powerless to take it, or takes it subject to the right of alteration, amendment or repeal.

Keokuk & Western R. R. Co. vs. State of Missouri, 152 U. S., 301.

In this case it appeared that the Alexandria & Bloomfield R. R. Co. was chartered by special act of February 9th, 1857, under the Laws of Missouri. Its special charter contained the following exemption: "Stock of said company shall be exempt from taxation for a period of twenty years after its completion." On March 2nd, 1869, the Legislature passed an act authorizing any railroad corporation to consolidate with the railroad of another state, and provided that the consolidated company should "be entitled to the same franchises and privileges, under the Laws of this State, as if the consolidation had not taken place." It appeared that pursuant to this Act, the company consolidated with an Iowa corporation under the name of M. I. & N. Ry. Co.

Subsequently its property and franchises were sold under a mortgage to the plaintiff in error and the State levied taxes upon the property of the consolidated company. The plaintiff in error claimed the exemption given by the original act of incorporation with the A. B. R. Ry. Co. The court held that by the consolidation of 1870, the two companies were dissolved and a new company was organized under the Laws of the State of Missouri, subject to the constitution of 1865, which contained the following provision: "No property, real or personal, shall be exempt from taxation, except such, etc." the exceptions not covering railroads. Enunciating the same doctrine laid down and referring to in many of the cases hereinbefore referred to.

P. F. & M. I. vs. State of Tennessee, 161 U. S., 174.

In that case the Legislature of the State of Tennessee passed an Act incorporating the Bluff City Insurance Company of Memphis, and by Section 10 it was enacted: "That said Company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

In 1858 the Legislature incorporated the De Soto Insurance Company, and its charter was amended in March, 1860, and by Section 11 of the Act "all the *rights, privileges and immunities*" of the Bluff City Insurance Company were granted to the DeSoto Insurance Company.

In March, 1867, the Washington Fire & Marine Insurance Company was incorporated by the Legislature, and by the Act of incor-

poration "all the *rights and privileges*" (omitting the word "immunities") of the DeSoto Insurance Company of Memphis were granted to the Washington Fire & Marine Company.

In 1881 the name of the W. F. & M. Ins. Co. was changed to the Phœnix Fire & Marine Insurance Company of Memphis.

The question was, whether the plaintiff in error succeeded to the exemption from taxation originally granted to the Bluff City Insurance Company.

Mr. Justice Peckham, in delivering the opinion of the Court, examined at great length most of the cases bearing upon this question, and a majority of this Court came to the conclusion that whether or not the words "rights and privileges" were broad enough, originally, to pass an exemption from taxation, that the significant omission of the word "immunities" which was contained in the grant to the DeSoto Company, was significant of the intention of the Legislature not to permit the words "privileges" to be extended sufficiently to include the word "immunities." And therefore in the particular case, this Court held that the immunity from taxation did not pass under the word "privileges."

The conclusion of the prevailing opinion was, that the Court must determine, from all the circumstances, in each case, whether there was the intention that it should pass.

Picard vs. E. T. V. & G. T. T. Co., 130 U. S., 637.

This is a case that was practically determined upon the authority of *Morgan vs. Louisiana*, cited supra, although the Court examined to some extent, the question as to whether an exemption from taxation would pass under the word "privileges." Yet the defendant in error claiming an exemption from taxation, took its title under a statutory foreclosure of a mortgage, and the decree provided only for the sale of the "*property and franchises* of the Railroad Company executing the mortgage, and originally vested with the immunity from taxation."

The W. & W. R. R. Co. vs. Alsbrook, 146 U. S., 279.

In that case the plaintiff in error claimed immunity from taxation upon its branch roads, under a statute of the State of North Carolina, which incorporated the original company, and exempted from

taxation the property of the Company in the following language: "Property of said Company and the shares therein shall be exempt from any public charge or tax whatever."

By Section 21 of the Act, branch roads were authorized, and by Section 22 it was provided

> "that all the powers, rights and privileges conferred by the preceding section upon the said Company, in respect to the main road, and the lands through which it may pass, are hereby declared to extend in every respect to the said Company, and the President and Directors thereof, in the *laying out,* in the *construction,* and in the *use and preservation* of such lateral or branch road."

This Court held that a fair construction of this language, limited as it was, was, that the words "powers, rights and privileges" related only to the laying out, the construction, the repair and the operation of the branches, and not to the exemption from taxation.

We now desire to call the Court's attention to the cases where this Court held the doctrine that where there was a merger of two corporations, the merging corporation retaining its corporate life, that under apt words, an exemption from taxation passed.

Yazoo & N. V. R. R. Co. vs. Adams, 180 U. S., 1.

In this case, the Court at great length discussed the question as to whether the decision of the State Court that a statute did not create a contract, presented a federal question, and held, very distinctly, that the Supreme Court was to determine for itself as to the existence of the contract.

The facts of the case are exceedingly complicated, but it appears that several Railroad Companies, enjoying, under their respective Charters, exemptions from taxation, became consolidated into one Company, in 1892, and the new Company claimed to hold the exemptions from taxation by virtue of the consolidation under which it acquired all of the rights, privileges and franchises of the companies. The Court held, following the long line of cases, that the plaintiff in error became a new corporation with a new grant of corporate franchises and having become incorporated, subsequent to the adoption of the new Constitution of 1890, making such corporation subject

to the provisions which require the property of corporations to be taxed like that of individuals, and consequently, the consolidating Company, being forbidden by the Constitution of the State from enjoying exemption from taxation, could not lawfully exercise the rights held by the old Company. The Court exhaustively reviewed many cases, distinguishing the cases which counsel will now proceed to cite, and upholding their doctrine.

See Opinion at pages 19 and 20, where all of the cases which we will now cite are approved. The whole result of the decision of the Court is summed up at page 25 of the Opinion in the following paragraph: "Being of opinion that the consolidation in question, which took place nearly two years subsequent to the adoption of this Constitution, was a new grant of corporate franchises, within the meaning of Section 180, it follows that it became subject to the provisions of Section 191."

The Court's attention is called to the fact that in all of the preceding cases, the Supreme Court recognizes the fact that exemptions from taxation will pass to another Company if the language of the statute authorizing the transfer is broad enough to include them, and there is no existing statute or constitutional provision in existence when the new purchasing Company comes into life, which forbids it from exercising the particular privilege, or which reserves the right to alter, amend or repeal it.

Southwestern R. R. Co. vs. State of Georgia, 92 U. S., 762.

The head note of that case is as follows:

> "Where a new corporation was not created by the union of two companies, but the powers of one Company were enlarged, and all the *rights, privileges* and *property* of the other became the rights and property of the former, the exemption from taxation, which each of the companies enjoyed under their original Charters, was not changed by such union."

It appeared that two railroad Companies, each enjoying in their Charters an exemption from taxation beyond one-half of one per cent. of its income, were united by an Act of the Legislature, the effect of which was to extinguish the Muscogee Railroad Company by its merger in the Southwestern. The Court said:

"No new corporation was created by the union of the two companies; but the powers of the Southwestern were enlarged and all the rights, privileges and property of the Muscogee Railroad Company became the rights and property of the Southwestern. The exemption from taxation, which both companies enjoyed under their original charters, cannot, therefore, be withdrawn by the Legislature."

This case holds, not only that an exemption from taxation may pass, under a merger, but that the words, *"rights, privileges and property"* are broad enough to pass it.

Tomlinson vs. Branch, 82 U. S., 460.

In this case, the power of the State Legislature to exempt certain property from taxation, was again affirmed. The Second Subdivision of the head note is as follows:

"Where a railroad by its charter was granted such an exemption for a limited period, and was afterwards merged in another railroad company, which became invested with all its property, rights and privileges, the exemption and its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the property so acquired, without express words or necessary intendment to that effect."

In this case the Court held very distinctly that the exemption from taxation, for a limited period, of the property of the railroad merged, passed under the words, *"property, rights and privileges."* But it was claimed by the merging corporation that its own perpetual exemption from taxation must be extended to the property of the merged corporation. But the Court held very distinctly that this was not so, that it only extended to such rights and privileges as the merged company had theretofore enjoyed. The Court in its opinion referred to the case of the *P. W. & B. R. R. Co. vs. Maryland, 10 Howard, 376,* where the same claim was made, that the merging company, having a greater exemption from taxation than those contained in the charters of the companies merged, that its own exemption extended to all of the property acquired by it under the merger.

The Court in speaking of that case refers to it as follows:

"One of these companies was exempt from certain taxation,

and it was claimed by the consolidating company that this exemption was transferred to it and affected all parts of the line. The Act authorizing the union of the several companies provided that the 'said body corporate so formed should be entitled * * * to all the powers and privileges and advantages then belonging to the former corporations,' and the new company claimed the exemption from taxes as one of the privileges and exemptions acquired. But the Court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered the evident meaning of the law to be, that whatever privileges and advantages either of the former companies possessed, should in like manner be held and possessed by the new company, to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place and possess the power, rights and privileges they had severally enjoyed in the portions of the road which had previously belonged to them."

The Court, it will be observed, distinctly recognized the doctrine that the exemption from the taxation of the merged companies passed to the merging company, but only to the extent that it had been enjoyed theretofore by the merged companies. Exactly to the same effect is *Central R. R. & B. Co. vs. State of Georgia, 92 U. S. 665.*

That was a case of a merger, but the new company claimed that it, possessing under its original charter an exemption from taxation, that the exemption extended to the property acquired by it from the merged company. The Court distinctly recognized the doctrine that upon the merger of the two corporations, any rights and privileges or exemptions from taxation enjoyed by either company, passed, but that those exemptions were confined to the property held and owned by the original companies, each for itself, prior to the merger.

Tennessee vs. Whitworth, 117 U. S., 139.

That case unanimously determined by the Court is an unanswerable authority upon the position which we here take, that the exemption for making pavements passed to the Rochester Railway Company under the provisions of the merger act, and under the words, *"property, rights, privileges and franchises."*

The head note of that case is as follows:

"A grant to a railroad company of all the rights, powers and

privileges, or all powers and privileges of another company, entitles it to the same exemptions from taxation that the other company has. Second—Upon the consolidation of two or more railroad companies, under authority of law, the presumption is that the new company has all the powers and privileges of the old company."

The Court exhaustively examined the meaning of the word "privilege." The case was complicated by a provision in the constitution of the state, which provided "The Legislature shall have no power * * * * to pass any law granting to any individual or individuals, rights, privileges, *immunities or exemptions,* other than such as may be by the same law extended to any member of the community * * * *" It was shown that the Supreme Court of Tennessee had decided that the words "rights," "privileges," "immunities" and "exemptions," must be given a construction so that neither of the words could be construed to include the meaning of the other. Therefore, the word "privileges" could not include the word "immunities," or "exemptions," and that the statute granting *rights, privileges* and *franchises,* must be construed as the constitution had been construed. The Court in answer to this contention said:

"We see nothing in the constitution which gives to the word 'right,' or 'privileges,' or 'immunity,' or 'exemption,' any different meaning than that which it has among the people at large. There may be and probably are some 'immunities' and some 'exemptions' which would not be considered as either 'rights' or 'privileges' in the popular acceptation of those terms. It was to reach such immunities and such exemptions, as seems to us, that this particular form of expresssion was used in the constitution; and not to provide that under no circumstances should the word 'privilege' in a statute of Tennessee be held to include a privilege of exemption from taxation. Words in a constitution as well as words in a statute, are always given the meaning they have in common use, unless there are very strong reasons to the contrary. We find no such reasons in this case, and as an exemption from taxation is a privilege in the popular sense of that term, we feel ourselves compelled to decide that both the Tennessee and Alabama Company and the Central Southern Company were granted such an exemption by their charters, notwithstanding the contrary opinion of the Supreme Court of Tennessee, which, although entitled to great respect, is not binding upon us as an authority under the circumstances of this case."

It was further held that these rights passed to the Nashville & Decatur Company under a consolidation of the two companies into it, and it will be observed that at the time the Nashville & Decatur Company came into existence there was no constitutional provision and no statute, as in many of the other cases, which prevented it from taking these exemptions from taxation. Had there been, the case would have fallen directly within the line of authority laid down in the case of *Shields vs. Ohio, 95 U. S. 219*, and the other cases cited.

Humphrey vs. Pegues, 83 U. S., 244.

The head note in that case states the decision:

> "Where a state granted a Charter to a Railroad Corporation and subsequently passed an Act amending its Charter by exempting its property from taxation, a subsequent Railroad Corporation created by such State, with all the powers and privileges of the former corporation, possessed the same immunity from taxation."

The Court, speaking through Mr. Justice Hunt, disposed of the whole contention in the following language:

> "All the 'privileges,' as well as powers and rights of the prior Company, were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, as a special exemption from a burden falling upon others."

It will be observed that in all of the cases cited and examined there was a general exemption from all taxation, either for a limited time or perpetually, contained in all charters examined and which were claimed to constitute contracts, and in all of them necessarily a very rigid rule of construction was applied, that a general exemption from all taxation will never be implied but must be conferred by clear and unmistakable language. The exemption was contained in a charter and not in a franchise, as in the case at bar, thereby leaving the State free to act in some fo the cases under its reserved power.

Again, it will be observed that the special charters examined in all of these cases contained no words of assignability, nor was the

exemption granted to the particular corporation, "its successors and assigns."

But the grant in every case was directly to the particular company.

And it will further be observed that in all of these cases the Court held invariably that, although the Legislature in conferring the exemption intended it as a privilege personal to the grantee, yet it was held that it was competent for the same or a subsequent Legislature to permit a transfer of the exemption by a precedent or subsequent act, provided the language contained in the Act permitting the transfer, was broad enough to cover the particular exemption granted to the first grantee.

Therefore, by the language used in all of the cases, wherein an exemption from taxation is spoken of as a personal privilege which cannot be assigned, it is clearly meant that it cannot be assigned by virtue of any power of assignment contained in the act itself, which grants the exemption from taxation, but that it is entirely competent for the Legislature to permit an assignment of the personal privilege spoken of by another act. And so, running through all the cases cited, the Court will see how carefully the language permitting the mortgage of property, franchises and privileges is scanned, how carefully the language of statutes bestowing upon another company the same rights and privileges held by the grantee company is examined, and how carefully the language of the several acts permitting the consolidation of the grantee company with another company not enjoying a special exemption is examined, and in every case, in the absence of a statute or constitutional provision, expressly forbidding the transfer to a new company, the Courts have held that these exemptions are transferable, while in the same breath the Court speaks of them as "personal privileges."

Therefore, we say that in the light of all these cases giving to them all their full force and effect and construing the grant to the Rochester City & Brighton Railroad Company of an exemption from paying for new pavements, as a privilege personal to that Company, then we say that, the same Legislature, the same power that conferred the privilege expressly provided in the Merger Acts of 1867 and 1879, that that particular privilege should pass to any merging company which might thereafter comply with the provisions of the Merger Acts.

And we urge that the Rochester Railway Company was such a merging corporation and that when it acquired the entire capital stock of the R. C. & B. R. R. Co., then held under lease, and filed the certificate required by the Merger Acts, it acquired all the estate, property, rights, *privileges* and franchises of the R. C. & B. R. R. Co., and now holds them as "fully and entirely and without change or diminution, as the same were before held and enjoyed," and that directly within the meaning and the authority of the several cases examined and digested under this head.

But Section 5 of Chapter 34 of the Act of 1869, was not a general exemption from taxation, if it was an exemption at all. As before argued, the franchise of the Rochester City & Brighton Railroad company, granted by the ordinances of the City of Rochester and the statute itself, was, under the unbroken line of decisions of the New York Courts, a piece of property, taxable and alienable as a whole. That piece of property was made up of the right to construct, maintain and operate a street railroad in the City of Rochester. Its value was made up from its earning capacity, the length of its life, the burdens imposed upon it, and the privileges and immunities possessed by it.

The Railroad Company could not dispense with the burdens, nor can the State, or the City of Rochester, destroy the benefits and leave the corporation to bear the burdens. The franchise was a piece of property, as a whole. That piece of property passed to the plaintiff in error under the lease and the proceedings taken under the merger acts, as a whole. It is impossible to say, truthfully, that the right to operate that railroad in the streets of Rochester passed, relieved from the burdens, in any degree, or without the corresponding benefits which off-set the burdens and gave the franchise value.

Herein lies the clear distinction between this case and every case cited and examined in this part of the brief, on behalf of the plaintiff in error. All those cases were, as before said, cases where the State had parted with its power of general taxation, and came directly within the rule that a state will never be presumed to have parted with its general power of taxation, except the language used is capable of no other construction, and it will never permit the privilege, if granted, to be regarded other than personal, except where the language used is capable of no other construction. But that rule applies, and

applies alone, to a release of the general power of taxation. It can have no application to a contract so plain, so well-defined, so just and equitable, as was this contract, when it was made in 1869.

Under the existing laws of the State of New York, the question to be determined here, involves the amount of the judgment recovered, and interest. It involves, possibly, from seventy-five thousand to one hundred thousand dollars, claimed by the City for pavements made since the making of the contract in 1901. So far as future pavements are concerned, the question is more academic than real. The Franchise Tax Law of the State of New York, held to be constitutional by the highest court of that State, held to be constitutional by this Court, permits the State and the City of Rochester, in the assessment of the value of this franchise, to make the tax cover, in the future, the value of every foot of pavement laid between its tracks, the rails of its tracks and two feet outside. The tax commissioners, in arriving at the value of a franchise, have the right to take into consideration its earning capacity, its burdens and its benefits, and to say what its value is, and the tax shall be assessed upon the basis of that value.

The passage of that law, and the construction given to it by this Court, is the strongest argument that can be made upon behalf of the plaintiff in error, that its construction of the Act of 1869, and of the merger acts, is right, eternally right. That this franchise, as a whole, is property, and the State cannot add to it or take from it, constitutionally, without the consent of the plaintiff in error.

Why should not the great sovereign State of New York be held to its contracts, deliberately made? Why should it seek, through the power of its sovereignty, to take from this corporation the thing which it has bought and paid for, to the extent of four millions of dollars? Why should it seek to strike down and emasculate the value of the thing which it has granted, by taking from it the very benefits that form the sole consideration for the burdens?

IV.

THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK, ENTERED BY DIRECTION OF THE COURT OF APPEALS SHOULD BE REVERSED, AND

SUPREME COURT OF THE UNITED STATES.

ROCHESTER RAILWAY COMPANY.
Plaintiff in Error,

vs.

CITY OF ROCHESTER,
Defendant in Error.

On page 96 of brief of plaintiff in error after figures "1869" in first paragraph insert.

But Chapter 34 of the Laws of 1869 was in no sense an exercise of the taxing power of the State, nor was it in any sense an exemption from taxation. The conditions and burdens imposed upon the Rochester City & Brighton Railroad Company and the benefits granted, constituted, together, the purchase price of the franchise, and the franchise itself then became property taxable by the State of New York, in the exercise of its powers of taxation, for any public purpose, the same as any other property. The nature of this so-called exemption was clearly pointed out in the franchise tax cases hereinbefore referred to. There it was claimed that the specific burdens in the way of annual percentages paid by the various corporations to the State or municipality, pursuant to the provisions of the several charters of such companies, or the franchises granted, was intended to be in lieu of all other taxation and deprived the State of its power to impose taxes for general or municipal purposes.

But this contention was aptly answered in the opinion of Judge Vann, delivering the judgment of the New York Court of Appeals, 174 N. Y. 448, and the following language aptly expresses the situation here:

> "The condition upon which a franchise is granted, is the purchase price of the grant, the payment of which in money, or by an agreement to bear some *burden,* brought the property into existence, which thereupon became taxable at the will of the legislature, the same as land granted or leased by the State. There is no implied covenant that property sold by the State cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption."

This reasoning was adopted by this Court in its disposition of these cases. In *People ex rel. M. S. R. Co. v. N. Y. S. B. of Tax Commissioners,* |*99 U. S. 1,* Mr. Justice Brewer, delivering the opinion of this Court pointed out in distinguishing the case of *Chicago v. Sheldon, 9 Wall. 50,* which was relied upon by the plaintiffs in error, the clear distinction between this case which is on-all-fours with *Chicago v. Sheldon,* and the franchise tax cases. At page 43, in speaking of that case, he said:

> "An ordinance was passed by the city council of Chicago prescribing the amount of work which a street railway company must do in the grading, paving, etc. of the streets on which its railway was authorized to be constructed. The company, having accepted and complied with the terms of this ordinance, the city attempted by assessment *for special improvements* to compel the railway company to pay for further work of the nature required by the original ordinance, and it was held that the obligations assumed by the railway company in respect to street improvements, as provided by the ordinance, could not be increased by special assessments for further improvements. But this involved no question of liability to general taxation and only held void the effort of the city, under the guise of special assessments, to increase the obligations *specifically assumed* by the railway company under the original ordinance."

And so here, the railway laws attempt to impose, under the guise of further conditions, the specific burden which the Act of 1869 took from the railroad company.

None of these Acts are in the nature, even, of taxation. The Act of 1869 imposed certain burdens which were the price paid by the company for the franchise granted. The railroad acts imposed specific burdens upon specific railroad companies, incorporated under the several acts, which are a part of the purchase price of the several franchises. The very nature of general taxation is, that the State imposes it upon the property of all citizens as equally as may be and all property in whosesoever hands it may be, is subject to this power, excepting certain property which may be specifically exempted where it is devoted to charitable, religious or public purposes. It is not claimed here, that this particular property is not subject to the exercise by the State of this power.

Again, the State exercises the power of special taxation for public improvements benefiting particular property. But this Court has uniformly held that although the State may itself determine the necessity of the improvement and the area of the property to be benefited, or may delegate that power to commissioners to determine, yet the assessment must be eventually laid against the property benefited, in proportion to the benefits received by the property, subject to the assessments, and at some stage of the proceeding the property owner is entitled to a hearing upon the question of the extent of the benefit to his property.

But the legislation in question does not conform, in any way, to the theory upon which general or special taxation is based.

Take the General Railroad Act of 1884, which, for the first time imposed upon railroads the duty of keeping the pavements in repair. Section 9 of that Act is quoted in full at page 11 of this brief. It will be seen that it imposed upon the railroads incorporated under the provisions of that Act and constructing or extending a railroad under the provisions of that Act, the duty of keeping in permanent repair a certain portion of the street or avenue in which its tracks were laid, provided those tracks were laid or constructed under the provisions of the Act itself. It did not apply to any tracks constructed prior to the passage of the Act.

And it provided that the municipal authorities might arbitrarily determine the necessity for repair and make the same at the expense of the corporation, in case of its neglect to do so.

This was not an exercise of the power of taxation, it was a condition imposed upon every railroad constructing a road or an extension of a road under the provisions of that particular Act, and a part of the purchase price of its franchise, and that franchise, when complete, was subject to the State's general power of taxation.

Then came the Act of 1890, Chapter 565 of the Laws of that year, which took effect on the first day of May, 1891.

Section 90 of Article 4 of that Act, made the provisions of the Act applicable to all street railroads organized for the purpose of building and operating or extending a street railroad. Section 98 of the Act imposed upon every such corporation the duty of keeping in repair a certain portion of the street in which its tracks were laid, whenever they might have been laid, and whenever required by

the local authorities and in such manner as the local authorities might prescribe.

It provided that in case of the neglect of a corporation to make the pavements or repairs, they should be made by the municipality at the expense of the corporation.

Here the Court will observe was an attempt upon the part of the legislature to arbitrarily impose this condition upon every street railroad, and as to all of its tracks, no matter what might be the provisions of its charter or the provisions of any franchise granted to it. It was not in the nature of taxation, because as before shown, it partook of none of the qualities or requisites of the legal exercise of the power of taxation. So far as it imposed this condition upon existing railroads, extending their tracks under its provisions and confined the burdens to such extensions, it was a legal exercise of the legislative power and the burden is properly treated as a part of the purchase price of the franchise. But so far as the Act attempts to impose this specific burden upon that part of the tracks of a railroad constructed long prior to the passage of any of the railroad acts in question, and constructed under a franchise specifically exempting it from this particular burden, the Act is an arbitrary exercise of legislative power and void under all the decisions, both of the State of New York and of this Court.

The distinction between this case and all of the cases cited, bearing upon exemptions from general taxation, is as wide as space itself.

Upon the general principles involved in this action, I cannot refrain from quoting from the opinion of Mr. Justice James Wilson, to whose great services the people of the United States have lately accorded tardy appreciation, who, at the very beginning of the government, in the case of *Chisholm v. the State of Georgia, Second of Dallas, 49,* used this language:

> "Is the foregoing description of the state a true description? * * * Is there any part of this description which intimates, in the remotest manner, that a state, any more than the men who compose it, ought not to do justice and fulfill engagements? It will not be pretended that there is; if justice is not done; if engagements are not fulfilled; is it upon general principles of right, less proper, in the case of a great number, than in the case of an individual, to secure, by compulsion, that which will not be voluntarily performed? Less proper it surely cannot

be. The only reason, I believe, why a free man is bound to human laws is *that he binds himself.* * * * A state, like a merchant, makes a contract; a dishonest state, like a dishonest merchant, wilfully refuses to discharge it; the latter is amenable to a court of justice. Upon general principles of right, shall the former, when summoned to answer the fair demands of its creditor, be permitted, proteus-like, to assume a new appearance, and to insult him and justice, by declaring *I am a sovereign state?"*

THE JUDGMENT OF THE SUPREME COURT, OF APRIL 18TH, 1904, AND OF THE APPELLATE DIVISION OF THE SUPREME COURT, OF DECEMBER 6TH, 1904, SHOULD BE AFFIRMED WITH COSTS TO THE PLAINTIFF IN ERROR IN THE COURT OF APPEALS AND IN THIS COURT.

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Supreme Court of the United States

~~October Term 1905, No. 520~~

October Term 1906, No. 156

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JAMES H. McKE

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF ROCHESTER,
Defendent in Error.

In Error to the Supreme Court of the State of New York.

BRIEF IN REPLY ON BEHALF OF THE PLAINTIFF IN ERROR.

CHARLES J. BISSELL,
Attorney and Counsel for Plaintiff in Error,
ROCHESTER, NEW YORK.

WILLIAM C. TRULL,
JOSEPH S. CLARK, *of Counsel.*

Supreme Court of the United States.

OCTOBER TERM, 1906. No. 156.

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error.

vs.

THE CITY OF ROCHESTER,
Defendant in Error.

BRIEF IN REPLY ON BEHALF OF THE PLAINTIFF IN ERROR.

There are several claims made in the brief filed by counsel for the defendant in error, to which counsel for plaintiff in error desire briefly to reply.

First: Counsel for defendant in error at pages 22 and 23 of their brief, seek to limit the meaning of the language "rights, property, privileges and franchises" used in the merger acts of the State of New York, so as to exclude immunity from taxation and cite from *Phoenix Fire & Marine Insurance Company v. State of Tennessee, 161 U. S. 174,* which is referred to in the principal brief of the plaintiff in error, and refer to the language used in Chapter 446 of the laws of the State of New York for 1876, relating to railroads sold under foreclosure and point out that the language there used was "franchises, rights, powers, privileges and immunities"; and also call attention to the fact that Chapter 917 of the Laws of the State of New York of 1869, providing for the consolidation of railroad corporation, uses the language 'rights, privileges, exemptions and fran-

chises", and then calls attention to the fact that Chapter 254 of the Laws of 1867, which was the merger act, uses the words "estate, property, rights, privileges and franchises", and does not use the word "immunities."

But it would seem that this is a rather farfetched attempt to apply the doctrine of the insurance case here. The Act of 1867 was passed two years before the consolidation act, and nine years before the act providing for the foreclosure of mortgages, by different legislatures, legislating upon different subjects. But in the case in the 161st U. S., the Legislature granted to a company certain properties, rights, privileges, immunities and franchises, and then granted to the corporation succeeding to the rights of the last corporation, rights, privileges, franchises, etc., leaving out the word 'immunities"; and in that case the omission was held to be significant, but it certainly can have no significance here. The Act, Chapter 719 of the Laws of 1869, providing for consolidation does not use the word "property", but simply "right, privileges, exemptions and franchises."

Can it be doubted that the properties passed, under these words, to the consolidated corporation?

Second: Counsel for defendant in error, under their second point, beginning at page 30 of their brief, strongly urge that the rights granted to the Rochester City & Brighton Railroad Company by the Act of 1869, were subject to the reserve power of the Legislature to alter, amend or recall. This question has perhaps been sufficiently argued in the original brief filed by the plaintiff in error. It was there pointed out, that a clear distinction exists, running through all the cases in this Court and in the New York Court of Appeals, between contract rights, property rights, granted by the Legislature, and rights obtained under the charter. In other words, "chartered rights."

If the rights claimed are given by the charter, and the Act under which the charter is obtained is subject to the right to alter, amend or repeal, and the amending or altering act does not amount to the destruction of property, the reserve power may be exercised. But in no case has this reserve power been held to apply to the destruction or emasculation of a franchise.

The two cases upon this subject in the State of New York, most exploited by counsel here on either side, are entirely reconcilible.

People v. O'Brien, 111 N. Y. 1, is a case where the Court of Appeals held that contract rights, franchise rights, property rights, could not be affected by subsequent legislation. The case cited by counsel for defendant in error, *N. Y. v. 23rd St. R. R. Co. 113 N. Y. 113*, is a case purely of chartered rights, and in no wise conflicts with the doctrine laid down in the O'Brien case.

In that case the Legislature of the State of New York, by Chapter 514 of the Laws of 1860, authorized and empowered one Roe and others and their assigns, to lay, construct, operate and use a railroad in certain streets of the City of New York.

Shortly prior to the 12th day of December, 1864, the Bleeker Street and Fulton Ferry Railroad Company was organized under the General Railroad Act of 1850, and the route of its railroad set forth in its articles comprised the streets named in the Act of 1860.

On the 12th day of December, 1864, all the rights, privileges and franchises conferred upon Roe by the Act of 1860, were assigned and transferred to this corporation.

Then, by Chapter 100 of the Laws or 1873, the railroad company was authorized to extend its tracks into other streets, and among other conditions, the legislature imposed this:

> "The said company shall pay to the corporation of the State of New York, a license fee of fifty dollars for each and every car used by them on said extensions."

In the same year, and a little more than a month later, the Legislature passed Chapter 647 of the Laws of that year, which provided that in lieu of the payment of the license fee of fifty dollars for each car, the company should pay one per cent. of its gross receipts, annually, on the first day of October, in each year.

It did not appear that the Bleeker Street Company, between the dates of the passage of the two acts, had expended a penny in constructing any extension, or had in anywise acted upon or accepted in any way the provisions of the first act. There was nothing in either act that could be construed into a promise or a representation that the license fee, or the percentage, was to be in lieu of any further imposition.

In 1875 the Legislature passed Chapter 369 of the Laws of that year which authorized any railroad company to take a lease of all or any part of the Bleeker Street road. The road was leased to the Twenty-third Street Railroad Company, which then, for the first time, claimed that the Legislature could not alter the imposition of the license fee of fifty dollars or impose a different license fee or a percentage upon gross receipts. No question was made of any contract, and the Court expressly approving the case of *People v. O'Brien*, held that the legislation must be construed as an amendment to the charter of the Bleeker Street road.

Third: Counsel for defendant in error claim, under their first point, beginning at page 12 of their brief, that the decision of the Court of Appeals that the right of exemption from making new pavements granted by the Act of 1869 to the R. C. & B. R. R. Company did not pass to the plaintiff in error under the lease and merger act, is conclusive upon this point, and does not involve a federal question.

In the first place, the prevailing opinion of the Court of Appeals did not construe the language of the merger acts. The Court simply said, in the prevailing opinion, at page 101 of the record, that the language of the Act of 1869 did not, in itself, contain any authority for the transfer, and uses this language: "The language of the statute before us is personal, not attached to the property. It enacts that said Company 'not said Company, its successors or assigns' shall not be required to pay any part of the expense of re-paving the streets." But even if the Court had elaborately considered the language of the merger acts and determined that the language was not broad enough to pass this particular benefit attached to the franchise, it would not under the doctrine laid down and adhered to by this Court in many cases, be at all conclusive upon this point.

The question here, is, whether a contract made with the Rochester City & Brighton Railroad Company and with the Rochester Railway Company as its assignee, has been violated by the provisions of the General Railroad Act of 1890, and this Court will consider and determine every question which bears upon that proposition.

We need only refer to the cases already cited and digested under point Third, page 65 of the original brief filed herein by the plaintiff in error.

But in addition to that, there are numerous other late cases in which this Court has enunciated this doctrine:

Citizens' Bank of Louisiana v. Parker, 192 U. S., 73, was a case where the question came before this Court as to whether a contract existed.

A motion was made to dismiss the writ of error on the ground that the Court had no jurisdiction, the question simply being the proper construction of the statutes of the State of Louisiana. At page 77, in his opinion, Mr. Justice McKenna, referring to this claim, said:

> "That assuming that the judgment rests upon the grounds stated, we nevertheless have the power of review. The Federal question presented is, did the Bank at the time of the imposition of the license tax sued for, have a contract with the State exempting it from such tax? The elements of that question are the original contract and all subsequent legislation relating to the contract and which it is claimed modifies or changes it. The motion to dismiss is therefore denied."

In *G. R. & I. Ry. Co. v. Osborne, 193 U. S., 17, the question was* again raised. Mr. Justice White in delivering the opinion of the Court said, at page 27:

> "The jurisdictional question which was raised by the defendant in error requires first to be disposed of. It was objected that the judgment of the Supreme Court of Michigan in the case at bar was not based upon a Federal question, and hence this Court is, it is urged, without jurisdiction to entertain this writ of error. The objection, however, is not well founded. It is plain from the averments of the answer of the railroad company to the petition in mandamus, that the Company relied upon the provisions of the General Railroad Law of 1873, authorizing the incorporation of the purchasers of a railroad after sale in the foreclosure proceedings, as constituting a contract protected by the Constitution of the United States. The determination of the alleged estoppel * * * * necessarily involves a consideration of this claim of a contract right, pro-

tected from impairment by the Constitution of the United States. In substance, if not in express terms, such question was passed upon by the Court below. A Federal question which gives this Court jurisdiction, therefore, arises on the record."

Again, in *G. S. F. P. Hotel Company v. Jones, 193 U. S., 532*, a question as to the constitutionalty of the Mechanics Lien Law of the State of Ohio came before this Court.

In that case this Court construed the statutes of the State of Ohio and cited with approval the language of Mr. Justice Bradley in *Burgess v. Seligman, 107 U. S., 20*, opinion 33.

In *C. B. & Q. Ry. Co. v. Ill., 200 U. S., 561*, where an effort was made to deprive this Court of jurisdiction on the ground that the question involved was purely one of construction of the state's statute, the head-note of the case states, aptly, the decision:

> "A state court cannot, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States if a Federal right or immunity was especially set up or claimed which, if recognized and enforced, would require a different judgment."

Again, in *W. C. S. R. R. Co., v. Ill. 201 U. S., 506*, Mr. Justice Harlan, delivering the opinion of the Court at page 519, says:

> "The contention of the City that the writ of error should be dismissed for want of jurisdiction in this court cannot be sustained. It is true that the judgment of the state court rests partly upon the grounds of local or general law. But, by its necessary operation,—although the opinion of the state court does not expressly refer to the Constitution of the United States,—the judgment rejects the claim of the Company, specially set up in its answer, that the relief asked by the City cannot, in any view of the case, be granted consistently either with the contract clause of the Constitution or with the clause prohibiting the state from depriving any one of his property without due process of law. If that position be well taken, then a judgment based merely upon grounds of local or general law would be error; for the federal questions raised cover the whole case, and are of such a nature that the rights of the parties could not be finally determined without deciding them."

In *Muhlker v. N. Y. H. R. R. Co., 197 U. S., 544,* the question in that case involved the right to easements of light, air and access to plaintiff's premises, as against the construction of an elevated railroad in the street. The various decisions of the New York Courts upon this much mooted question were reviewed in the opinion of Mr. Justice McKenna, and at page 570 he uses this language:

> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract."

In the case of *County Com. of Wicomico County v. Bancroft, 203 U. S. 112,* Mr. Justice Day, delivering the opinion of the Court said:

> "Previous decisions of this Court have settled the proposition that whether such exemption has been in fact repealed by a subsequent state statute is a question of a state law, in which the decisions of the highest courts of the state, *in the absence of a contract* are binding; and that it is only where the exemption is irrepealable thus constituting a contract, that it becomes the duty of this Court to decide for itself whether the subsequent act did or did not impair the obligation of the contract."

And it was distinctly held in fact conceded in that case that there was no contract.

The case is on-all-four's with the situation that the case of *Conway v. The City of Rochester* would have been in, had the City of Rochester sued out a writ of error to review the decision of the Court of Appeals in that case. The construction of the Court of Appeals in that case, that the General Railroad Act of 1890 repealed the exemption clause, and the Act of 1869 would have been conclusive here and the writ would have been dismissed, for the reason that there was no constitutional question urged or raised, and no one before the Court who could raise it, but now the plaintiff in error comes into court urging that the Act of 1869 was a contract with

it, and that the contract clause of the Constitution protects it.

In a late case, decided by this Court, and not yet reported, *F. H. & W. R. R. Co. v. City of New Haven*, decided December 3rd, 1906, the question arose as to the validity of an assessment against the plaintiff in error. This Court in an opinion by Mr. Justice McKenna, ruled against the contention of the plaintiff in error, but examined the question upon the merits, and the Court used this language:

> "So deciding betweeen the statutes, the Court adjudged that the Act of 1895 was constitutional, on the ground that it was a proper exercise of the police power of the state, and on the ground that the Act was an exercise of the power reserved by the state of altering, amending or repealing the charter of the railway company. If either ground is tenable the judgment must be affirmed. We will place our decision on the second ground, as being of more local character, and because the exercise of the power expressed only comes under our review in its excess. We accept the decision of the Supreme Court of Errors, that the statutes were intended as an exercise of the power of amendment reserved by the State, although plaintiff in error contends that such was not their intention."

The Court then, after citing several Connecticut cases, continued:

> "Was such an amendment in excess of the power of the state? The limitation upon the power of amendment of charters of corporations has been defined by this Court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the Legislature may deem necessary to secure, either the object of the grant or any other public right not expressly granted away by the charter. In another case it was said that the 'alterations must be reasonable; that they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment and alteration.'"

The Court then cites many cases in this Court holding this doctrine.

Within the authority of this and the cases cited, it might be said here, that even conceding what is not claimed by the counsel for defendant in error, and what has never been claimed, that the Act of 1869 was an amendment to the charter of the R. C. & B. R. R. Co., and that the Railroad Act of 1890 must be construed as a further amendment, that under the circumstances of this case and in view of the practical construction placed upon these acts, the amount of moneys expended by the original grantee and by the plaintiff in error upon the faith of the Act, such an amendment would be within the condemnation of this Court, as unreasonable, and confiscatory in its effects.

But there is no need for the plaintiff in error to invoke that rule, for clearly none of these acts were amendments to the charter of the Rochester City & B. R. R. Company and the Court of Appeals so held.

> "But the act of 1869 neither amends or assumes to amend the charter of the Company."

Per Cullen, Ch. J., Record page 99.

Fourth: It is strongly urged in the brief of counsel for the defendant in error, that the passage of the General Railroad Act of 1890, of some of the provisions of which we complain as impairing the obligation of a contract, was an exercise of the taxing power of the state. It would seem that this contention has already been sufficiently answered in the original brief filed herein by the plaintiff in error. Whatever may be said of the imposition of the liability to make new pavements upon railroads constructing their road under the provisions of the General Railroad Act, or upon that portion of the railroad of such company extended under the provisions of the Railroad Act, it is very clear that the imposition, arbitrarily, of this duty, upon that portion of the tracks of a railroad company, organized and constructing its tracks long prior to the passage of any of the General Railroad Acts, is not an exercise of the taxing power, but a gross discrimination and attempt to impose an absolute burden, without any referee whatever to equality or any reference whatever to

any benefit to the property upon which the burden is imposed. The Court of Appeals of the State of New York in *People ex rel. Davidson v. Gilon, 126 N. Y. 156, 157*, doubted whether an assessment or charge for a local improvement for paving the streets upon a road operated by horse power was justified, under any rule of taxation. Clearly such an imposition upon a railroad operated by electricity, which makes no use whatever of the pavement, is not based upon a theory of benefit to the property against which the assessment is made, or the arbitrary charge levied.

The Statute provides for no notice whatever to the railroad company upon the question as to whether the improvement shall be undertaken. It provides for no notice whatever to the railroad company of any hearing as to the amount of the assessment, but arbitrarily fixes it at the cost of whatever pavement may be selected by the city authorities, no matter how expensive, between the rails, the tracks, and two feet outside of the tracks. Such notice is, by the charter of the City of Rochester, all of the germane provisions of which are set out in the answer and which charter is a public act and was in evidence upon the trial, provides for notice of all these matters to every other property owner and an opportunity to be heard.

Viewed as an exercise of the power of taxation, the statute would be void in its application to the plaintiff in error, within the meaning of the Fourteenth Amendment to the Federal Constitution.

Fifth: With reference to the questions discussed under the Fifth point in the brief filed by counsel for defendant in error, when the original brief was filed by counsel for plaintiff in error, it was thought that these questions were disposed of by the decision of the Supreme Court of the State of New York which was not disturbed in any way by the decision of the Court of Appeals.

But in view of some of the later cases cited in this brief in reply, it has occurred to counsel that possibly this Court may rule that in determining whether contract rights of the plaintiff in error have been violated by the legislation in question, it will, for itself, determine, as a part of that question, whether those contract rights, if they existed, have been waived by the plaintiff in error by virtue of the extensions made by its predecessor under the General Railroad

Act of 1884 and by it under the General Railroad Act of 1890, or by the contract of 1894. Upon these questions, therefore, counsel for plaintiff in error beg leave herewith to print, as a part of this brief, their argument before the Court of Appeals when those questions were before that Court, and which the majority of the Court evidently omitted to pass upon. Those points were discussed as follows:

POINTS.

II.

THE VARIOUS EXTENSIONS MADE BY THE ROCHESTER CITY & BRIGHTON RAILROAD COMPANY OF ITS RAILROAD, UNDER THE GENERAL RAILROAD ACT, CHAPTER 252 OF THE LAWS OF 1884, DID NOT AMOUNT TO A WAIVER OF ITS RIGHTS UNDER THE ORDINANCES, AND CHAPTER 34 OF THE LAWS OF 1869.

By the 24th finding of fact, found at page 73 of the record, it appears that after the passage of the General Railroad Act of 1884, the Rochester City and Brighton Railroad Company obtained from the municipal authorities of the city of Rochester, various consents to extend its track and railroad into various streets of the city of Rochester, and these consents were from time to time granted and each contained the condition provided for by the statute of 1884,

> "upon the express condition that the provisions of chapter 252 of the Laws of 1884, pertinent thereto shall be complied with."

It is seriously urged by the appellant's counsel, that the application for these various extensions and the acceptance of the grant of such extensions by the Rochester City and Brighton Railroad Company, amounted to an agreement upon its part to waive all of the privileges and exemptions to which it was entitled under the Act of 1869 and to bring its whole road under the provisions of section 9 of the Act of 1884. This certainly would be a most extraordinary result and before it is judicially determined that such a result neces-

sarily attended the making of extensions under the Act of 1884, that act should be most carefully examined.

A careful study of chapter 252 of the Laws of 1884 will show that it was passed for the purpose of encouraging the construction of street railroads in the State of New York, and directly to encourage the extension of existing street railroads, and all of the provisions of the act which impose burdens upon street railroads are carefully drawn, so as to distinctly provide, that as to all railroads organized under the Act itself, and constructing their roads under the provisions of the Act itself, the burdens apply to the whole road and as to all existing street railroads constructing branches or extensions under the provisions of the Act, the burdens are made to apply only to that portion of the existing street railroad embraced in the branches or extensions constructed under the provisions of the Act.

A careful study of the whole Act will show that it was never intended to discourage the extension of an existing road, by providing that if it extended its road one rod under the provisions of the Act, that then all the burdens of the Act should fall upon not only the extension itself, but all of the existing system constructed under charters and franchises, which for years had exempted it from any of these burdens. It is plain to be seen that such a construction would have discouraged, upon the part of existing railroads, any attempt to extend their lines one inch.

Take the case of the Rochester City and Brighton Road, which had practically at the time of the passage of the Act of 1884, gridironed the city of Rochester with its tracks, possessing as to all its existing tracks franchises which exempted it from paying any percentage of its gross receipts to the city, which exempted it from any burden of paying for new pavement in any of the streets in which its rails were laid. The contention is that if it availed itself of the Act of 1884 to extend its road a rod that operated *eo instanti* to wipe out all its franchises and bring its entire system under and subject to all the burdens of the Act of 1884.

It is insisted that such a construction was never contemplated by the Legislature. No such practical construction has even been put upon the Act by any city in the State of New York. Aside from the results that would follow from such a construction, in the dwarfing

of all enterprises to extend existing roads, the Act itself is so carefully drawn that it does not admit of any such construction. The first section of the Act provides for the incorporation of new companies.

The last sentence of the section applies to existing railroads in the following language:

> "No existing street surface railroad company shall extend its line or construct any branch thereof under this Act, until it has made and filed with the Secretary of State a certificate,"

Section 3 of the Act provides as follows:

> "Any company organized as aforesaid, or any existing street surface railroad company or corporation heretofore organized for the purpose of building and operating a street railroad, may construct, maintain, operate, use and extend a railroad or branch, on the surface of the soil,"

Then follow the provisions for obtaining a consent of the local authorities and the consent of the property owners. Under the provisions of section 7,

> "The local authorities of any incorporated city or village to whom application under the provisions of this Act may be made for consent to the construction, maintenance, use, operation or extension of a street surface railroad upon any street, road, avenue or highway, may at their option provide for the sale of and sell at public auction the franchise, subject to all the provisions of this Act to so construct, maintain, use, operate or *extend* such street surface railway."

Then follow provisions regulating the manner of sale. Clearly the thing that is sold is the franchise to build the railway, or an extension of an existing railway, and in either case the thing bought is the franchise to construct a railroad in certain streets, or to extend an existing railroad into certain streets. By section 8, it was provided as follows:

> "Every corporation incorporated under or constructing or operating a railroad constructed or *extended* under the provi-

sions of this Act, within the cities of this State, having a population of two hundred and fifty thousand or more * * * shall for and during the first five years * * * pay into the treasury * * * 3 per cent of its gross receipts."

Then follows this other significant provision showing the purpose of the Legislature not to extend this to the whole receipts of existing road,

"provided, however, that every corporation now existing and operating a street surface railway which shall extend its tracks or construct branches therefrom and operate such extentions or branches under the provisions of this Act * * * shall pay such percentages as aforesaid only, upon such portion of its gross receipts, as shall bear the same proportion to the whole value thereof, as the length of such extension and branches shall bear to the entire length of its tracks."

It is further provided in the same section that in other cities and villages the municipal authorities *might* require the payment of 3 per cent of the gross receipts, the amount thereof to be determined in proportion to the length which the *extension* constructed bore to the whole line.

A similar provision is found in section 13, fixing the rate of fare as follows:

"No company or corporation, incorporated under or constructing and operating a railroad under the provisions of this Act, shall charge any passenger more than five cents for one continuous ride. * * * This section shall not be construed to apply to any part of any road heretofore constructed and now in operation, unless such company shall acquire the right to extend such road or to construct branches thereof, under the provisions of this Act, in which event its rate of fare shall not exceed its authorized rates prior to such extension."

Section 9, the provision in question, imposing a burden, is in the language following:

"Every such corporation incorporated under, or constructing, extending or operating a railroad constructed or *extended* under the provisions of this Act * * * shall also whenever and as required, and under the supervision of the proper local au-

> thorities, have and keep in permanent repair that portion of every street and avenue between its tracks, the rails of its tracks and a space two feet in width outside and adjoining the outside rail of its track, or tracks, so long as it shall continue to use *such* tracks *so constructed under the provisions of this Act.*"

The question arises, taking the whole Act together, its apparent purpose to encourage, not only the building of new railroads, but the extension and betterment of existing railroads, whether the meaning of this section is, that if an existing railroad, constructed and in operation prior to the passage of the Act and having mileage of a hundred miles, extended its road under the provisions of this Act, assumed the burden of paving with new pavement between the tracks and the rails of its tracks and two feet outside, in all the streets in which it had constructed and was maintaining a railroad, or whether it means, that so long as it so continued to use such tracks, so constructed under the provisions of this Act, its liability is confined, under section 9, to paving in that street or those streets, in which it extended and constructed its line under the provisons of the Act of 1884.

It would seem that the language is susceptible of no other construction than the one contended for by the defendant here. The construction contended for by the plaintiff would do violence, not only to the evident purpose of the Act, but would do violence, to its language, and make the burden imposed by section 9, far different in extent from any of the burdens imposed by any of the other sections to which attention has been called. The language of the whole Act is satisfied by the construction contended for here, that the burden imposed by section 9, upon an existing street railroad was to compel it to pave only in those streets in which it extended or constructed branches under the provisions of the Act, leaving to its charter and its existing franchises, the question as to its liability to repair or repave the streets in which its tracks were already constructed.

Assuming the construction here contended for to be the true construction of section 9 of the Act of 1884, then when the Rochester City & Brighton Company obtained leave under its provisions to extend its tracks in certain streets and accepted the benefit of such

provisions, it may be said that it also assumed all the burdens imposed by the other provisions of the Act, and exactly what those burdens were is apparent from the construction of the Act itself contended for. It evidently agreed, when it availed itself of this privilege, to pave between the tracks, the rails of its tracks, and two feet outside, in all those streets in which it had extended its road or constructed branches under the provisions of the Act of 1884, but not in any of those streets in which it had obtained its franchise, had constructed and was operating a railroad prior to the passage of the Act of 1884.

Upon the question of the practical construction placed by the city of Rochester upon the Act of 1884, I call the attention of the court to the ordinance of the Common Council which appears in finding of fact number eleven, passed on the 29th day of March, 1887, in which section 2, in relation to repairing pavements, was amended and which provided that in the streets and avenues where the railroad track was laid prior to May 6, 1884, the company should repair the pavement between its tracks and the rails of its tracks.

This was in exact accordance with the ordinance of January 12, 1869, and chapter 34 of the Laws of 1869, and the ordinance further provided that in all extensions or branches of the railroad constructed since the 6th day of May, 1884, the repairs should be made between the track, the rails of the tracks and for a space of two feet in width outside of and adjoining the outside rails of the track, in direct accordance with the construction here contended for of section 9 of the Railroad Act of 1884; that it applied only to the streets in which extensions were built under the Act of 1884 itself. This was the common sense construction, the construction contended for and laid down by the then corporation counsel and the one that has been followed in all the cities of the state, and satisfies the condition imposed by the Act, that its provisions "pertinent" to the exension granted, only, shall be complied with.

Particularly is this construction made clear by the language of section 4 of chapter 252 of the Laws of 1884, prescribing the conditions which the Common Council shall annex to its consent to the *construction or the extension* of a railroad in any of the streets of the city. That section provides that the consent of the Common

Council shall contain the express provision, that the franchise for the extension is granted upon condition that the railroad company shall comply with "the provisions of this Act *pertinent thereto.*" The provisions of the Act which are to be complied with are only those which are pertinent to the whole railroad if an entire railroad is constructed under the act, or to the extension alone if only an extension is asked for and granted.

In this connection it is well to state that the Court of Appeals of the State of New York in the *Matter of 3rd Avenue R. R. Co. 121 N. Y. 536*, determined what was the meaning of the word "construction" of a railroad, and there held that the construction of a street railroad meant the obtaining of the franchise and the construction of an original railroad in the street and that the taking up of the ties and rails of an old company and replacing them with new, was not a construction of a railroad, and that the changing of motive power from horse to electricity, even although it involved the entire rebuilding of the road, from the foundation to rail, was not a construction within the meaning of the railroad statute. There was therefore no construction of any railroad by the Rochester C. & B. R. R. Company or the plaintiff in error, under the Railroad Act of 1884, or that of 1890, excepting in the streets in which *it was extended* under the provisions of that act.

As bearing upon the construction herein placed upon the provisions of Chapter 252 of the Laws of 1884 of the State of New York, attention is called to Section 18 of that Act, known as the saving clause, as follows:

> "All acts and parts of acts whether general or special, inconsistent with this Act are hereby repealed. But nothing in this Act shall * * * interfere with or repeal or invalidate any rights heretofore acquired under the Laws of this State, by any horse railroad company, or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road, in accordance with the terms and provisions of its charter * * "

II.

THE ACT OF THE PLAINTIFF IN ERROR IN APPLYING FOR AND OBTAINING EXTENSIONS OF ITS RAILROAD, AND OF THAT OF THE ROCHESTER CITY & BRIGHTON RAILROAD, LEASED TO AND MERGED BY IT, UNDER THE PROVISIONS OF THE GENERAL RAILROAD ACTS OF 1890, 1892 AND THE SEVERAL ACTS AMENDATORY THEREOF, DID NOT OPERATE AS A WAIVER OF ITS RIGHTS IN THE RAILROAD OF THE ROCHESTER CITY & BRIGHTON RAILROAD COMPANY, GIVEN BY CHAPTER 34 OF THE LAWS OF 1869, NOR MAKE THE WHOLE OF ITS RAILROAD SUBJECT TO THE PROVISIONS OF SECTION 98 OF THE RAILROAD LAW.

It appears by the twenty-fourth finding of fact (Record page 46) that after the lease of the Rochester City & Brighton Railroad Company of its property and franchises to the defendant, and the merger, the defendant from time to time applied to the municipal authorities of the city of Rochester for leave to extend its lines, under the provisions of the Railroad Law, and such extensions were granted and accepted subject to the conditions imposed by the Railroad Law as follows:

> "That the foregoing consent is given upon the following conditions expressly, to wit: that the provisions of article 4 of the Railroad Law pertinent thereto, shall be complied with. That this consent shall be filed in the office of the Clerk of the County of Monroe."

The mere fact that the Rochester Railway Company was incorporated under the provisions of chapter 252 of the Laws of 1884, did not bring it within the provisions of that Act so far as section 9, or the paving clause, was concerned, as to those streets in which the Rochester City & Brighton road had constructd its tracks, because by virtue of its lease of all the property and franchises of that road, it was admitted to operate a railroad in those streets by virtue of the Charter and franchises of the Brighton Railroad, and not by virtue of the Act of 1884. This was settled by the court of appeals. (*Gilmore v. City of Utica, 121 N. Y. 561.* See opinion, *572, 573.*)

But following the Act of 1884 came the General Railroad Act of 1890, which took effect on the 1st day of May, 1891. Section 90 of that Act was as follows:

> "A corporation organized for the purpose of building and operating or extending a street railroad, or any of its branches, for public use in the conveyance of persons and property in cars, for compensation, upon and along * * * must comply with the provisions of this article."

In 1892, section 90 was amended so as to provide as follows:

> "A corporation organized since May 6, 1884, for the purpose of building and operating, or extending, a street surface railroad, or any of its branches, for public use * * * must comply with the provisions of this article."

In 1893, section 90, by the provisions of chapter 434 of the Laws of that year, was amended so as to read as follows:

> "The provisions of this article shall apply to every corporation which, under the provisions thereof, or of any other law, has constructed or shall construct or operate, or has been or shall be organized to construct or operate, a street surface railroad or any extension, or extensions, branch, or branches, thereof for public use * * * must comply with the provisions of this article."

By chapter 933 of the Laws of 1895, section 90 was again amended but not so as to affect this portion of the section, the portion quoted being re-enacted, excepting it was made more grammatical.

The decision of the court of appeals in the *Conway Case* was doubtless predicated upon the sweeping language of section 90, which the court will readily see, as amended in 1893, applied to every street surface railroad corporation, no matter when it obtained its charter and no matter when it obtained its franchises, or whether they existed by contract or not. It is believed by counsel for the plaintiff in error, that if the court's attention had been called to the very broad saving clauses, in both the Act of 1884 and in the several railroad acts, and in view of its subsequent decision in *Parker v. E. C. & W. R. R. C.* 165 *N. Y.* 274, it would have arrived at a different conclusion. But

the railway company was not represented upon that argument, and had nothing to do with the litigation.

So far in this argument it has been assumed, that the provisions of the Railroad Act as construed by the highest court in this state, violate the obligation of the contract between the city of Rochester and the Rochester City & Brighton Railroad, and the Act is, therefore, unconstitutional and void in its application here, and the further question arises, whether these statutory conditions which have been inserted in every franchise granted to the Rochester Railway Company since the passage of the General Railroad Law of 1890, and the acceptance of such conditions by the plaintiff in error, constitute a waiver upon the part of the defendant of its right to question the constitutionality of the General Railroad Act, and amount really to a contract upon its part, to waive the constitutional quesion, in consideration of the additional franchise granted to it in the several streets into which it has extended its lines since 1890.

It will be observed that this condition, which first appeared in the Act of 1884, is a mandatory one. In other words it is inserted in each franchise granted in every city or village, by express command of the statute and the same language appears in the Act of 1884, and in section 92 of the Railroad Law, ever since the revision in the year 1890.

What would have been the effect if the language of the statute had been and the conditions inserted in accordance with such language had been as follows:

> "That the foregoing consent is given upon the following conditions expressly, to wit, that the provisions of artcle IV of the Railroad Law shall be complied with,"

it is hardly necessary to inquire. It might have been susceptible of the construction, that the acceptance of such a franchise by the railroad company, would have been an agreement upon its part to comply, as to its whole road, with all the conditions imposed by article IV.

But the language of the statute always has been and now is, that the provisions quoted in article IV of the Railroad Law *pertinent thereto,* shall be complied with.

It is very plain that the thing applied for in each instance is not a franchise to construct the whole road, but is a franchise to extend an existing road into a particular street or streets, and the words "such consent" clearly referred to the consent of the municipality to the extension of an existing road into certain streets. That is all that is asked for; that is all that is granted.

When the condition is imposed by the statute and by the consent itself following the statute, the words "pertinent thereto" clearly refer to the franchise for the extension and to nothing else. The things in the Railroad Law that are pertinent to the particular extension are the certificate to be filed in the office of the Secretary of State, naming the streets, or parts of streets, into which the extension is sought to be made, the consent of the property owners owning property abutting on the particular streets or parts of streets into which the extension is sought to be built, the sale of the particular franchise at auction, if in a city where a sale at auction is required, and the complying with the provisions of the statute as to such extension, the percentage of gross receipts required by the statute if the extension is in a city such as described in section 95, and the payment of such percentage, based upon such proportion to the gross receipts of the road as the length of the extension bears to the entire length of the road, the rate of fare as prescribed by section 101, wherein the rights of the company, as to its existing lines, are carefully preserved and the provisions of section 98, governing the paving of streets, so far as it is pertinent to the extension itself.

It is impossible to give any reason for the use of the words "pertinent thereto," unless it be assumed that the Legislature intended that the conditions should be that the company asking and accepting the franchise should take that franchise and construct and operate the extension, subject to all of the provisions of the Railroad Act bearing upon the extension itself.

If the Legislature had intended that wherever a railroad was extended a rod, that its existing system should become subject to all the burdens of the Railroad Act, although its original charter and franchise exempted it from any such burdens, the Legislature would not have inserted the words "pertinent thereto," but would have left them out and compelled the railroad company to have agreed to sub-

ject its whole system to the burdens of the railroad act, in consideration of the bestowal of the franchise.

But as shown in a former part of this brief, this was not the policy of the Act of 1884, nor was it the policy of the General Railroad Acts following, which are all based upon the lines of the Act of 1884 and following it generally throughout with amendments, which experience has suggested from time to time.

If, therefore, the defendant is right in its contention that the application of the provisions of the General Railroad Act to those streets in which the Rochester City & Brighton Railway Company had constructed its road prior to the passage of Chapter 252 of the Laws of 1884, by force of the language of the Act itself, renders the Act unconstitutional and void, then it cannot be said that its agreement to accept a franchise for extensions of its existing line upon condition that it comply with all the provisions of the Railroad Act pertinent to the franchise for such extensions, is an agreement upon its part to waive the constitutional question and assume all of the burdens of the General Railroad Act, as to the whole of its road no matter when or under what contract it was originally constructed.

As bearing upon the construction herein given to the provisions of the General Railroad Act of 1890, attention is called to Section 181 of that Act known as the saving clause, as follows:

> "The repeal of a law or any part of it, specified in the annexed schedule, shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred, prior to May 1st, 1891, under or by virtue of any law so repealed, but the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such a law had not been repealed. * * *"

Annexed to this Act was a schedule of laws repealed. Chapter 34 of the Laws of 1869 is not among them.

In 1892 the Legislature of the State of New York, on the 18th day of May, passed Chapter 676 of the Laws of that year known as the Act to Amend the Railroad Law. By the first section of that Act, Section 109, and Sections 180 to 183, both inclusive, of the Railroad Act of 1890, were repealed.

On the same day the Legislature of the State of New York passed Chapter 677 of the Laws of that year known as the Statutory Construction Law. Section 31 of that Act provided as follows:

> "The repeal hereafter, or by this chapter of any provision of a statute which amends a provision of a prior statute, does not revive such prior provision. The repeal hereafter or by this chapter of any provision of a statute, which amends the provision of a prior statute, leaves such prior provision in force unless the amendatory statute be a substantial re-enactment of the statute amended. The repeal of a statute or part thereof shall not affect or impair any act done or right accruing, accrued or acquired, or liability, penalty, forfeiture or punishment incurred prior to the time such repeal takes effect. But the same may be asserted, enforced, prosecuted or inflicted as fully and to the same extent as if such repeal had not been effected. * * * *"

Annexed to this Act was a list of statutes specifically repealed. Chapter 34 of the Laws of 1869 is not among them, nor has there ever been any specific repeal of any provision of that statute. It will be observed that the Legislature took out of the Railroad Law, as such, the saving clause and enacted it in a general statute which applied to all the laws of the state.

III.

THE PETITION BY THE PLAINTIFF IN ERROR TO THE COMMON COUNCIL OF THE CITY OF ROCHESTER FOR CONFIRMATION OF THE LOCATION OF ITS TRACKS, AND THE EXECUTION BY IT OF THE AGREEMENT OF THE 31ST OF DECEMBER, 1894, AND THE ORDINANCE OF THAT DATE, DID NOT AMOUNT TO AN AGREEMENT BY IT TO WAIVE THE CONSTITUTIONAL PROTECTION OF ITS RIGHTS UNDER THE ACT, CHAPTER 34 OF THE LAWS OF 1869.

It appears by the twenty-fifth finding, (Record, page 47) that on the 11th day of December, 1894, the defendant presented to the city of Rochester its petition, setting forth, the location of the tracks

of the several railroad companies, whose rights and franchises the defendant had acquired, and setting forth that the exact location of the tracks in the several streets as they then existed has not been fixed with due formality, and setting forth that the location of many of the tracks between the curb and the sidewalk instead of the middle of the street, or rather the right to such location, was not a matter of record, and the proof of such right in case a question should be raised, would be a tedious and expensive process, and finally praying that by a formal resolution, the location of the tracks, poles, wires and appurtenances, *as located and constructed,* should be approved, then in the petition followed a description of the location of all the tracks, poles and wires in each street, wherein any of the Railroad companies, whose rights had been obtained by the defendant, or the defendant had constructed and maintained tracks, and in the description of such streets were included the two streets in question here, North St. Paul street and Park avenue.

It further appears that the Common Council of the city of Rochester, on the 31st day of December, 1894, passed an ordinance, confirming the location of such tracks upon certain conditions therein stated, and requiring the defendant to enter into a contract in accordance with the resolutions and on the 31st day of December, 1894, the Rochester Railway Company did execute such a contract, which recited all of the resolutions and contained a provision indemnifying the city of Rochester against all suits, actions and proceedings, as provided in the agreement of February 25, 1890.

The resolutions appear in the Finding annexed to the contract. They recited the application, that a time and place was fixed for its consideration and notice published according to law, and that all persons appearing were heard and then confirmed the location of the railroad and tracks of the Rochester Railway as now operated and used by the company in the streets, avenues and highways, upon certain conditions. The first condition was as follows:

> "First. That the provisions of article IV. of the Railroad Law of the State of New York, being the Act in relation to railroads, constituting chapter 39 of the General Laws of the State of New York, be complied with."

It next provided for the transportation of policemen in uniform and of members of the paid fire department of the city of Rochester upon the cars of the defendant without charge. The fourth provision or condition of the resolution, is as follows:

> "Fourth. That all of the provisions of any agreement between the city of Rochester and *any street railroad company,* and all ordinances, resolutions, grants and consents heretofore passed by said city with reference to the construction, maintenance or operation of street railroads within said city, shall remain in full and binding force and these resolutions shall not be construed *as extending* or *affecting* the franchise of any such company, or the time of the expiration of any such franchise, or the moneys required to be paid to said city by such company, or as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company."

It is apparent from the resolutions, that the application of the Rochester Railway for the confirmation of the location of its tracks, was treated by the city authorities as an application for a franchise and all of the formalities prescribed by the Railroad Act were complied with. But it is respectfully suggested, that the resolution did not grant any franchise within the meaning of the Railroad Act, nor was any franchise asked for. The whole proceeding was upon the assumption that the franchises already were in existence and the railway company was in the enjoyment of them.

The presumption of law was, that inasmuch as the tracks of the company were in each of the streets and its railroad in operation, that the railroad was there regularly, lawfully and in accordance with a franchise duly granted, and the application was for formal resolution ratifying and confirming the defendant's right to the location of its tracks already laid by virtue of the franchises which it already possessed, and for the purpose of making a tangible record of such location of tracks under franchises which were concededly already in existence and which had already been granted. The fact that the corporation counsel in drawing the resolutions assumed that the application was for a franchise and that it required all the formalities prescribed by the Railroad Act, does not alter the situation, that no franchise was asked for and none was granted.

The fact that the petition was not an application for, nor the contract and ordinance a grant of, a franchise, is made clear by an examination of the provisions of the Railroad Law. Section 2, which provides for the incorporation of a railroad company, in subdivision 11, specifies that if the company is to be a street surface railway the articles shall contain the names and description of the streets, avenues and highways in which the road is to be constructed. Section 90, provides, that any street surface railroad proposing to extend its road or to construct branches thereof, may from time to time file in the office in which its certificate is filed, a statement of the names and description of the streets, roads, avenues, highways and private property in or upon which it is proposed to construct, maintain or operate such extensions or branches.

Section 91 then provides as follows:

> "A street surface railroad or extensions or branches thereof, shall not be built, extended or operated unless the consent in writing etc."

Then follows the requirements for the consent of the majority of the property owners and the consent of the local authorities, to be first obtained. Section 92 provides that the application for the consent of the local authorities shall be made in writing and provides for public notice to be given before the application is granted and then section 92 provides,

> "Such consent must be upon the express condition that the provisions of this article pertinent thereto shall be complied with, etc."

These sections, therefore, relate only to an application for a franchise to construct a street surface railroad or an extension or a branch thereof. The petition in question did not ask for permission to construct a railroad or an extension or a branch thereof. It assumed that that consent had already been given, and the road was constructed and in operation in the various streets mentioned. The petition did not assume that the consent of any property owners was to be asked to the confirmation of the location of its tracks, but it appears affimatively therein that a consent of the

property owners had been obtained at the time that the franchises were granted and the road constructed in the particular location in such streets, to wit: either upon the sides between the curb and the sidewalk, in the center of the street, or upon one side or the other of the center and in the traveled part.

It was entirely competent for the local authorities, when the franchises had originally been granted, to specifically provide for the location of the track in the particular street in which the franchise was granted, or the local authorities could leave the location of the track to the executive officers, and in the city of Rochester that was the executive board, and the particular location of the tracks was a matter of detail and of regulation, but the right to operate the road at all in the street, or to construct it therein, was the subject of a grant and was in and of itself a franchise.

It appears upon the face of the petition, that the road was in operation in all of these streets with the consent of the local authorities, and with the consent of the property owners originally given. The only matter which was in doubt and which was to be made certain, was the particular location of the track in the street itself and the records, as appears by the petition, failed to show specific authority in many of the streets, from the Common Council or the Executive Board for the particular location adopted, and it was that omission which the petition sought to cure, it was that omission which the ordinance and the contract were aimed to cure.

The contract then, in connection with the ordinance, must be construed not as the grant of a franchise requiring the insertion of certain conditions fixed by section 92 of the Statute, but a simple agreement between the railroad company and the city, and in that agreement the intention of the parties must be sought from an examination of its whole context.

It is very plain that the draftsman of the ordinance in drafting the first condition, prescribing that the provisions in article 4 of the Railroad Law must be complied with, had in mind the requirements of the statute as to the condition that should be placed in a consent, grant and franchise and inadvertently left out the words "pertinent thereto," and if the contract and ordinance amounted to the grant of a franchise, the court in obedience to the mandate of the statute,

would unquestionably read into this condition these words which were evidently inadvertently omitted by the draftsman.

But inasmuch as it is not, as heretofore shown, the grant of a franchise but a simple contract between the parties, competent to make it, these words contained in this condition must be construed in connection with the provisions of the fourth condition contained in the agreement, which has already been cited in full. If the two conditions are absolutely in conflict, then the intention of the parties must be sought by a study of the whole context, and it follows necessarily, that the condition that all of the provisions of article four of the Railroad Law should be complied with, must be construed to mean that they must be complied with only so far as they shall not affect, alter or add to any previous contract existing between the parties.

Any other construction would render the fourth condition absolutely nugatory and meaningless. The fourth condition so plainly evidences the intention of the parties that we cannot go astray in its construction. The words are "and these resolutions shall not be construed as *extending or affecting* the franchise of any such company, or changing or modifying the terms of any agreement," the words "such company," referring, as shown by the previous context, to any street railroad company, with which the city of Rochester had theretofore made any agreement, or granted to ,any consents or franchises.

The counsel for the defendant in error, at page 62 of his brief, quotes the following and cites certain authorities to sustain it:

> "It is a well settled rule of construction of contracts and statutes, that special provisions will not be held to be limited or modified by general provisions later appearing, and that the particular provision will be construed as an exception to the general provision. *Wormser v. Brown, 149 N. Y. 165, 170.*"

Counsel for the plaintiff in error does not quarrel at all with this rule of law and it may be supplemented by saying, that it is equally a well settled rule of construction that general provisions in a contract will be deemed to be limited and modified by special provisions later appearing and that the particular provisions will be construed as an exception to the general provision.

Taking the contract of 1894 as it reads, the provision first appearing that all the provisions of Article 4 of the Railroad Law must be complied with, is in and of itself a general provision stated in the most general language. There are any number of burdens imposed upon street railroad companies by Article 4 of the General Railroad Act, and the general language would seem to mean that all of them were to be complied with were it not for the specific provision in the contract following, which has just been quoted. All the provisions of Article 4 of the Railroad Law shall be complied with except that these resolutions shall not be construed as *extending* or *affecting* the frachise of any such company, or changing or modifying the terms of any agreement.

This was a special provision put into the contract so as to except from the sweeping clause that all of the provisions of Article 4 of the Railroad Law must be complied with, the particular agreement in regard to paving, legalized by the act of 1869.

Perhaps there was also another exception which would be well to make clear. The provisions of the Railroad Law, Section 101, permitted the plaintiff in error to charge any passenger five cents for a continuous ride from any point in its road to any other point.

It was bound by its contract, under the act of 1869, to charge children under five years of age nothing and children between five and twelve years of age only three cents. This provision of Article 4 of the Railroad Law was clearly excepted by this specific clause in the agreement from the general clause.

There were other general provisions in Article 4 which were excepted by the particular clause.

There is, therefore, nothing in these resolutions or in the contract of the plaintiff in error accepting them, which can be held, when the whole ordinance and contract are carefully examined, to evince an intention upon the part of either of the contracting parties, that any of the existing rights of plaintiff in error or any of the city's existing rights, should be in any manner affected by the resolutions or the contract accepting the same. But the intention is clear upon the part of both, that they should remain entirely unaffected and unimpaired, and there should be imposed upon the railroad company, as a consideration for the confirmation of the location of defendant's tracks, the additional burdens in the way of carrying

free of charge various of the city's officials and employees.

But if it should be assumed that the petition of the railroad company was an application for a franchise under article 4 of the Railroad Law, and the ordinance was the grant of such a franchise and the contract the acceptance of the same, then it is submitted that the ordinance and contract amounted to a confirmation of the provisions of the Act of 1869.

It appears by the ordinance annexed to the contract of the defendant, set out in the twenty-fifth finding of fact, that the Common Council saw fit to require the railroad company, in addition to the burdens already imposed upon it, to carry free not more than two policemen at a time upon each of the cars of the defendant and also to issue certain tickets to certain members of the detective force and to carry free of charge not more than two firemen at a time upon each of the cars of the company, and then the city by the forth subdivision of the ordinance, which was a part of the contract, and which is found at page 82 of the record, expressly provided that

> "all ordinances, resolutions, grants and consents heretofore passed by said city with reference to the erection, maintenance or operation of street railroads within said city, shall remain in full and binding force,"

and further that the ordinance shall not be considered

> "as repealing, modifying or changing in any respect the terms or provisions of any agreement previously entered into between said city and any street railroad company."

And upon this question we say that the city and the railroad company not only refrained expressly from changing or modifying in any manner the previous agreement, but expressly confirmed it in all respects, and the city expressly confirmed it for a new and valuable consideration, moving to it from the railroad company, namely, the carrying of policemen, detectives and firemen free. And furthermore, this contract was made, this ordinance passed requiring it to be accepted by a binding contract upon the part of the railroad company, which was duly made and delivered and approved by the proper city officials, at a time when the General Railroad Act of

1892 was in full force and effect and under the General Railroad Act of 1899, the city of Rochester had full and ample power delegated to it by the Legislature to make in the granting of a franchise any contract with any railroad company which it saw fit, binding both for any length of time which it choose to specify.

People v. Barnard, 110 N. Y. 548.

In that case, speaking of chapter 642 of the Laws of 1886, known as the Cantor Act, which was subsequently incorporated in full in the General Railroad Act, Judge Earl, delivering the opinion of the court, at page 553, says:

> "Under this act and under the constitutional provisions applicable to the construction of street railways, the municipal authorities have an absolute power to grant or withhold their consent to the construction of street railways and they may impose any conditions however onerous and difficult to perform which seem to them, in the exercise of their discretion, to be proper as the term upon which their consent will be given."

Having the power to impose any conditions which the Common Council saw fit and having the power to require the railroad company to accept such conditions, when the conditions were accepted the grant of the franchise, accompanied by the conditions, became a binding contract between the municipality and the railroad company which was inviolable and which the Legislature had not the power to abrogate, alter or amend.

B. C. R. R. Co. v. B. C. R. Co. 32 Barb. 358.
People v. Sturtevant, 9 N. Y. 273.
Milhau v. Sharp, 27 N. Y. 611, 620.
People v. O'Brien, 111 N. Y. 1

Respectfully submitted,
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9th Floor German Insurance Building,
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WILLIAM C. TRULL, New York,
JOSEPH S. CLARK, Philadelphia,
of Counsel.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1905

No. 156

Office Supreme Court U. S.
FILED
FEB 26 1906
JAMES H. McKENNEY,
Clerk

ROCHESTER RAILWAY COMPANY,

Plaintiff in Error.

vs.

THE CITY OF ROCHESTER,

Defendant in Error.

In Error to the Supreme Court of the State of New York.

AFFIDAVIT AND NOTICE OF MOTION TO ADVANCE CAUSE.

W. W. WEBB,
Corporation Counsel.
Attorney for Defendant in Error.
Rochester, N. Y.

Supreme Court of the United States.

October Term, 1905.

No. 501.

ROCHESTER RAILWAY COMPANY,

Plaintiff in Error,

against

THE CITY OF ROCHESTER,

Defendant in Error.

SIR :

Take notice, that a motion will be made at a Term of the Supreme Court of the United States to be held at the Capitol, in the City of Washington, D. C., on the 26th day of February, 1906, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for an order advancing the above entitled cause and setting it down for argument for a particular day, upon the grounds that special and peculiar circumstances exist in this case, which require its advancement; and that the revenues of the principal cities and villages of the State of New York will be affected by the decision in this case; and questions of great public importance are involved herein; and that the

validity of a general statute of the State of New York applying to all the cities and villages of said state requiring street railway corporations to pave between their tracks, the rails of their tracks, and two feet outside thereof, is questioned herein; and that the principal cities and villages of the State of New York, and the citizens and taxpayers thereof, and the street railway corporations operating therein, and their stockholders and bondholders, are interested in the result of this cause, and that the public interests demand a speedy hearing and determination of the same.

Dated, February 19, 1906.

Yours, Etc.,

W. W. WEBB, Corporation Counsel,

Attorney for Defendant in Error,

46 City Hall, Rochester, N. Y.

To CHARLES J. BISSELL, ESQ.,

Attorney for Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1905.

No. 501.

ROCHESTER RAILWAY COMPANY,

Plaintiff in Error,

against

THE CITY OF ROCHESTER,

Defendant in Error.

STATE OF NEW YORK, }
COUNTY OF MONROE, } ss.
City of Rochester, }

William W. Webb, being duly sworn deposes and says: That he is Corporation Counsel of the City of Rochester, and attorney for the above named defendant in error.

That this cause comes before this Court pursuant to a Writ of Error issued by the Supreme Court of the United States on the 16th day of November, 1905, directed to the Supreme Court of the State of New York.

That this action was commenced in the Supreme Court of the State of New York, on the 15th day December, 1902, to recover $18,274.02, expenses incurred by the defendant in error in paving between the tracks, the rails of the tracks, and two feet outside thereof, of the plaintiff in error. That this action was tried in

the Supreme Court which dismissed the complaint herein, and the judgment entered thereon was affirmed by the Appellate Division of the Supreme Court, and an appeal was taken therefrom to the Court of Appeals of the State of New York, that being the highest state court of said state, which Court reversed the judgments below and directed that judgment be entered in favor of the defendant in error, and against the plaintiff in error, for the full amount demanded in the complaint, with interest and costs. That pursuant to said order and judgment of the Court of Appeals, judgment of the Supreme Court of the State of New York was entered herein on the 6th day of November, 1905, in favor of the defendant in error, and against the plaintiff in error, for the sum of $23,704.55. That thereafter the plaintiff in error sued out a Writ of Error in this Court, which was allowed and issued by this Court on the 16th day of November, 1905, and that pursuant thereto a citation was served on the defendant in error on the 17th day of November, 1905.

That this action was commenced pursuant to § 90 of Chapter 565 of the Laws of 1890 of the State of New York, as amended by Chapter 933 of the Laws of 1895, and § 98 of Chapter 565 of the Laws of 1890 of the State of New York, as amended by Chapter 676 of the Laws of 1892. That said Chapter 565 of the Laws of 1890 is entitled, "An act in Relation to Railroads," and is a general law of the State of New York governing railroads. That § 98 thereof provides that: "Every street surface railroad corporation, so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair a portion of such street, avenue or public place, between its tracks, the rails of its tracks, and two feet in width outside of its tracks;"

and further provides that in case of the neglect of a corporation to do so, the local authorities may make such permanent improvement at the expense of the railroad corporation. That the plaintiff in error failed and neglected to make permanent repairs between its tracks, the rails of its tracks, and two feet outside thereof, on Park avenue and North St. Paul street, in the City of Rochester, after notice so to do, and that the same were thereafter made by the defendant in error; and this action was brought to recover the expenses incurred by the defendant in error in making such permanent improvements.

That Chapter 252 of the Laws of 1884 of the State of New York, which went into effect on the 6th day of May, 1884, entitled, "An Act to Provide for the Construction, Extension, Maintenance and Operation of Street Surface Railroads and Branches thereof in Cities, Towns and Villages," contained a provision requiring every corporation incorporated under it, or constructing, extending or operating a railroad under it, to keep in permanent repair the portion of every street and avenue in cities and villages, between its tracks, the rails of its tracks, and two feet in width outside thereof.

That the plaintiff in error claims in this action that the act under which this action was commenced is unconstitutional so far as it relates to all franchises acquired by it previous to the 6th day of May, 1884, the date on which said Chapter 252 of the Laws of 1884 took effect. That the franchises on the streets in question in this action were acquired previous to said 6th day of May, 1884.

That the plaintiff in error claims that the act under which this action was commenced violates the provision

of the Fourteenth Amendment of the Constitution of the United States, providing that a person shall not be deprived of property without due process of law, and contravenes § 10 of Article 1, of the Constitution of the United States forbidding the impairment of the obligations of a contract.

That the plaintiff in error claims that pursuant to an act of the Legislature passed in the year 1869, it had a contract with the State of New York, and with the defendant in error, which exempted it from paying any portion of the cost of an improvement of a street in which its tracks are laid, in case it acquired the franchise therefor prior to the 6th day of May, 1884; and that deponent is of the opinion that if this cause should be decided in favor of the plaintiff in error, the street railway corporations in the principal cities and villages of the State of New York will, by reason of some similar statute, or some ordinance or contract of similar effect, also be exempted from the provisions of said statute; and deponent is therefore of the opinion that the principal cities and villages of the State of New York are interested in the result of this cause.

That the Court of Appeals of the State of New York decided in this action that the provisions of Chapter 565 of the Laws of 1890, entitled, "An Act in Relation to Railroads," requiring street railroad corporations to keep in permanent repair certain portions of the streets on which they operate, was an exercise of the powers of taxation of the State of New York. That the provisions of said act requiring railroad corporations to pave certain portions of the street apply to all cities and villages of the State of New York, and that the result of this action will affect the principal cities and villages of said State of New York, and that the

public interests require that this action be speedily heard and determined, in order that public improvements in the cities and villages of the State of New York may not be hindered or delayed, and in order that the revenues and finances of the cities and villages of said State may not be disarranged. That it is of the greatest importance to the cities and villages of the State of New York, to the local governments thereof, and to the citizens and taxpayers thereof, that an early determination be reached in this case. And deponent is of the opinion that special and peculiar circumstances, as set forth above, exist in this case, which should result in its advancement, and deponent therefore asks that this case be advanced and be set down for argument before this Court on a particular day to be determined by this Court.

W. W. WEBB.

Sworn to before me this 19th day of February, 1906.

CHESTER F. KIEHEL,
Notary Public.

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Supreme Court, U.S.
FILED.
DEC 29 1906
JAMES H. McKENNEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1906

No. 156

ROCHESTER RAILWAY COMPANY,
Plaintiff in Error,

vs.

THE CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR

WILLIAM W. WEBB,
Corporation Counsel,
Attorney and Counsel for Defendant in Error
ROCHESTER, N. Y.

BENJAMIN B. CUNNINGHAM,
Of Counsel.

Supreme Court of the United States.

October Term, 1906.

No. 156.

ROCHESTER RAILWAY CO.,
Plaintiff in Error,
against
THE CITY OF ROCHESTER,
Defendant in Error.

In Error to the Supreme Court of the State of New York.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

This action was brought to recover the sum of $18,274.02, with interest, alleged to be due to the City of Rochester upon account of the city having at its own expense laid pavements in Park Avenue and North St. Paul Street in said city between the tracks, the rails of the tracks and two feet in width outside of the tracks of the Rochester Railway Company; said Rail-

way Company having been given notice to make such pavements and having failed to do so. (Record, pages 3-6.)

The Court of Appeals of the State of New York directed that the Supreme Court award final judgment in favor of the defendant in error and against the plaintiff in error for the amount claimed in the complaint herein, together with interest and costs; and thereupon judgment of the Supreme Court was entered in favor of the defendant in error and against the plaintiff in error, for the sum of $22,556.55, with $1,148 costs, amounting in the aggregate to the sum of $23,704.55. (Record, pages 110, 111.) Thereupon this writ of error was sued out to review said judgment of the Supreme Court of the State of New York.

Ordinances for the construction of the pavements in question were adopted in 1900, and at that time the General Railroad Law of the State of New York (Laws of 1890, Chap. 565) contained the following provisions :

> "The provisions of this article shall apply to every corporation which under the provisions thereof or of any other law has constructed or shall construct *or operate,* or has been or shall be organized to construct or *operate* a street surface railroad *or any extension or extensions,* branch or branches thereof."
>
> *Article* 4, §90, *as amended by Laws* 1895, *Chap.* 933.

> "Every street surface railroad corporation, so long as it shall continue to use any of its tracks on any street, avenue or public place in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails

> of its tracks, and two feet in width outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so and in such manner as they may prescribe. In case of the neglect of any corporation to make pavements or repairs after the expiration of thirty days' notice to do so, the local authorities may make the same at the expense of such corporation."
>
> *Article* 4, §98, *as amended by Laws* 1892, *Chap.* 676.

The Court of Appeals has construed these provisions and held that under that statute "it became and was the duty of the Rochester Railway Company to keep in permanent repair such portions of the street through which it passed as was within its tracks and two feet in width outside, and that the local authorities of that city were vested with the authority of determining when the repairs should be made. * * * The language employed by the legislature is broad enough to include re-pavement as well as repairs."

Conway vs. The City of Rochester, 157 N. Y., 33.

In 1900 an ordinance was passed by the Common Council of the City of Rochester requiring the Rochester Railway Company to pave St. Paul Street from Main Street East to the New York Central & Hudson River Railroad Company's bridge, between the tracks, the rails of the tracks and for two feet outside of the rails of the tracks of said Rochester Railway Company. (Record, page 61.) Thereafter the notice required by the Railroad Law was given to the plaintiff in error requiring it to make such pavements, and said Railroad Company neglected and refused to make such pavement. (Record, page 62.)

Thereafter and on the 9th day of October, 1900, the first ordinance was passed by the Common Council of the City of Rochester ordaining that the paving of St. Paul Street from Main Street East to Central Avenue was necessary and should be made, and that the expense of the work between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company should be charged to and collected from the Rochester Railway Company, and the expense of the remainder assessed upon the abutting property. (Record, pages 62, 63.) Thereafter notice was published in the official papers of the City of Rochester for four days stating that said ordinance would be considered at a certain meeting of the Common Council, in which notice it was stated that a portion of the estimated expense was intended to be charged to and collected from the Rochester Railway Company (Record, pages 64, 65), and on the date set in said notice, the Common Council considered said ordinance and passed a final ordinance directing the construction of said pavements, and directing that the expense of the work between the tracks, the rails of the tracks and two feet outside of the rails of the tracks of the Rochester Railway Company be charged to and collected from the Rochester Railway Company, and that the remainder of the expense be assessed upon the abutting property—the ordinance reciting that the Rochester Railway Company had been notified to make such pavement, and had failed to do so. (Record, pages 65, 67.)

At that time North St. Paul Street was a public street in the City of Rochester (Record, page 61); and the Rochester Railway Company was operating in said street a street surface railroad for public use and the conveyance of persons and property for compensation. (Record, page 67.) Thereafter the defendant in error pursuant to said ordinance constructed a pavement in North St. Paul Street from Main Street East to Cen-

tral Avenue between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company, as well as in the remainder of said street between said points, and expended on account of such improvement between the tracks, the rails of the tracks, and two feet outside of the tracks of said Rochester Railway Company, various sums sought to be recovered in this action. (Record, page 67.)

In July, 1900, the Common Council of the City of Rochester passed an ordinance directing the Rochester Railway Company to pave Park Avenue from Alexander Street to Meigs Street, between the tracks, the rails of the tracks and two feet outside of the tracks of said Rochester Railway Company. (Record, pages 67, 68.) Thereafter the notice required by the Railroad Law was given to said Rochester Railway Company requiring it to make such pavement, and said Railway Company neglected and refused to make such pavement. (Record, page 68.)

On the 4th day of June, 1901, an ordinance was adopted by the Common Council of the City of Rochester, reciting that it was proposed to improve Park Avenue from Alexander Street to Meigs Street by the construction of a medina stone pavement and proposing that the cost of said pavement between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company be charged to said Company and the remainder of the cost of said pavement be assessed upon the abutting property. (Record, pages 68, 69.) Thereafter notice was published for four days in the official papers of the City of Rochester that the Common Council would take action on said ordinance on a certain day. In said notice it was stated that it was intended to charge the cost of paving between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company to said Rochester Railway Company. (Record,

page 69.) Upon the date set in said ordinance, the Common Council considered said ordinance and adopted a final ordinance for the improvement of Park Avenue from Alexander Street to Meigs Street, in which it was directed that the cost of paving between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company be charged to said Railway Company, and that the remainder of the expense be assessed upon the abutting property. (Record, page 70.)

At that time Park Avenue was a public street in the City of Rochester (Record, page 67), and the Rochester Railway Company was operating a street surface railroad therein for public use and the conveyance of persons and property for compensation. (Record, page 71.) Thereupon the defendant in error constructed a pavement in Park Avenue and expended in such work various sums for paving between the tracks, the rails of the tracks and two feet outside of the tracks of the Rochester Railway Company, which sums are sought to be recovered in this action.

The defendant in error is a municipal corporation. (Record, page 30.)

The original Rochester City & Brighton Railroad Company was incorporated on the 31st day of May, 1862, under the provisions of Chapter 140 of the Laws of 1850, for the purpose of constructing, maintaining and operating a street surface railroad from the Town of Brighton, Monroe County, through various streets in the City of Rochester, into the Town of Greece, Monroe County. (Record, page 30.)

On the 24th day of June, 1862, the Common Council of the City of Rochester granted to the said Rochester City & Brighton Railroad Company its consent to the maintenance, construction and operation of a street surface railroad in and through certain streets in the City of Rochester. (Record, page 31.) In the

ordinance it was prescribed that said consent be granted "upon the terms, conditions and stipulations hereinafter prescribed." (Record, page 32.) Among the conditions thus prescribed were the following :

> "Said company shall under the direction of and as required by the Common Council of the City of Rochester, improve with suitable material as such Common Council shall direct and in a proper manner, between its tracks, the rails of its tracks and for two feet and four inches outside thereof, and shall keep the surface of the street inside the rails and for two feet and four inches outside thereof in good repair, and all dirt and filth removed therefrom as may be directed and required by the said Common Council. * *
>
> The said Railroad Company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge, such children to ride free. * * *
>
> "It is hereby reserved to the Common Council of the City of Rochester to make such further orders, rules and regulations in relation to the construction repairs and operation of said Railroad Company as from time to time may be deemed necessary to protect the interests of said city, and the safety, welfare and accommodation of the public." (Record, page 32.)

The ordinance further provided that the grant should be formally accepted by the Railroad Company within sixty days from the date of the passage of the resolution in such manner as should be approved by the City

Attorney; and on the 8th day of July, 1862, said Rochester City & Brighton Railroad Company accepted the grant "*subject to the provisions and restrictions therein contained,*" and such acceptance was duly approved by the City Attorney. (Record, page 33.)

The Rochester City & Brighton Railroad Company executed a mortgage on its property and franchises. The same was foreclosed, and on the 28th day of February, 1868, the property and franchises of said Railroad Company were sold on a foreclosure sale to Chauncey B. Woodworth, who associated with himself certain other individuals and filed articles of incorporation of a new Rochester City & Brighton Railroad Company, for the purpose of operating a railroad in the City of Rochester, theretofore constructed, maintained and operated by the Rochester City & Brighton Railroad Company "in and through the streets wherein such railroad is now laid and run, and in and through such other streets as the public interests may hereafter require." (Record, pages 33, 34.) After the incorporation of the new company, it petitioned the Common Council of the City of Rochester, "*protesting against the onerous conditions of section two of the said resolution of* 1862." The question was debated for about a year, and on the 12th day of January, 1869, the Common Council amended section two of the ordinance of 1862, so as to read as follows :

> "Whenever it becomes necessary to improve by ordinance or otherwise, any of the streets through which their track is laid with a new or permanent improvement, said company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same, *during the term of five years from the adoption of this ordinance.*"

And § 6 in relation to fares, was amended to read as follows :

> "Said company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road, to or from the extremities at either railway depot, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge. Such children to ride free, and except also that said company shall not charge nor receive from children under twelve years of age, more than three cents for any of above distances." (Record, pages 34, 35.)

Shortly thereafter *an act was drawn by the Rochester City & Brighton Railroad Company*, a copy of which was transmitted to the Common Council of the City of Rochester by the Mayor thereof, and thereupon the Common Council passed the following resolution :

> "Resolved, That the clerk of this Board be authorized to transmit a copy of the bill relating to street railroads presented by the Mayor to this Board *to the Legislature requesting that body to legalize the action of the Common Council by the passage of said bill.*"

And thereupon the Legislature passed the act known as Chapter 34 of the Laws of 1869. (Record, page 35.)

The plaintiff in error in this action was incorporated on the 25th day of February, 1890, under the provisions of Chapter 252 of the Laws of 1884. (Record, page 42.)

On the 25th day of February, 1890, the Rochester City & Brighton Railroad Company executed and delivered to the plaintiff in error a lease of all its property, franchises, rights and privileges. Such lease was executed under the corporate seal of both companies and ratified by the stockholders of both companies, and was made "*pursuant to the provisions of the Statutes*

of the State of New York in such case made and provided." (Record, page 44.) Thereupon the plaintiff in error acquired "*pursuant to the Statutes of the State of New York in such case made and provided*" the entire capital stock of the Rochester City & Brighton Railroad Company which was surrendered and transferred to the defendant, and a certificate of such surrender filed in the office of the Secretary of State. (Record, page 44.)

In 1890 the plaintiff in error received permission from the Board of Railroad Commissioners of the State of New York to change the motive power of the railroad operated by it from horse power to electricity, and thereafter did equip said road with electrical appliances. (Record, page 45.)

After the passage of Chapter 252 of the Laws of 1884, The Rochester City & Brighton Railroad Company obtained from the municipal authorities of the City of Rochester various consents to extend its tracks into various streets of the City of Rochester "upon the express condition that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with;" and the plaintiff in error since it acquired the property of said Rochester City & Brighton Railroad Company has obtained from the municipal authorities of the City of Rochester various consents to extend its tracks and railroad into the various streets of the City of Rochester upon the condition "that the provisions of Article Four of the Railroad Law pertinent thereto shall be complied with." Both companies acted upon such consents and made extensions into various streets under such consents. (Record, pages 46, 47.)

In December, 1894, the defendant petitioned the Common Council for a ratification and confirmation of the location of its tracks and railroad, saying "these locations have not in many cases been fixed with due and proper formality." (Record, pages 47, 48.)

The Common Council thereupon passed an ordinance confirming such location upon condition "that the provisions of Article Four of the Railroad Law of the State of New York, being an act in relation to railroads constituting Chapter 39 of the General Laws of the State of New York, be complied with." (Record, pages 48, 51.)

Pursuant to the direction of the Common Council a contract was entered into between the city and the Railway Company in which the location of the tracks and railroad was confirmed and ratified, and in which the Rochester Railway Company agreed "to accept and in each and every thing and particular, well and truly to comply with each and all of the provisions and conditions contained and made in the following and accompanying resolution as adopted by the Common Council of said city." Among the resolutions which it agreed to accept was the one requiring compliance with Article Four of the Railroad Law. (Record, pages 49, 50, 51.)

The Court of Appeals upon these facts and upon the authority of Conway vs. City of Rochester, 157 N. Y. 33, decided that the Railroad Law applied to the Rochester Railway Company and required it to pay the cost of paving between the tracks, the rails of the tracks and two feet outside of the tracks of the street railroad operated by it, and that the Legislature could constitutionally impose this obligation upon the plaintiff in error.

POINTS.

I.

The Alleged Immunity from Taxation Being Personal to the Rochester City & Brighton Railroad Company Could not be Acquired by the Plaintiff in Error by Lease or Purchase of Said Company's Property and Franchises, Unless With the Permission of the Legislature of the State of New York. The Decision of the Court of Appeals that the Statutes of the State of New York Did Not Permit This Immunity to Pass to Plaintiff in Error Was Based Upon the Construction of State Statutes, and Thus no Federal Question is Presented. However, the Decision of the Court of Appeals is in Accord with the Construction Placed by This Court upon Similar Statutes.

The Court of Appeals, as one of the grounds of decision in this case, held that any right to exemption from the cost of paving streets which may have been held by the Rochester City & Brighton Railroad Company was personal and did not pass to the plaintiff in error. (Record, pages 100, 101.)

The Rochester City & Brighton Railroad Company was incorporated on the 5th day of March, 1868. (Record, page 34.)

The plaintiff in error, Rochester Railway Company, was incorporated on the 25th day of February, 1890, under an act of the Legislature of the State of New York, known as Chapter 252 of the Laws of 1884. (Record, page 42.)

At the time of the Rochester Railway's incorporation, the Rochester City & Brighton Railroad Company was operating a street railway in the City of Rochester and adjacent territory. The plaintiff in error was authorized by the act under which it was incorporated to lease the road of the Rochester City & Brighton Railroad Company. § 15 of Chapter 252 of the Laws of 1884 reads as follows:

> "§ 15. It shall be lawful for any street surface railroad company or companies to lease or to transfer its or their right, subject to all its or their obligations in respect thereof, to run upon or to use any portion of its or their railroad tracks to any other street surface railroad company authorized to run upon such route, upon such terms as may be agreed upon by a majority of the respective boards of directors thereof, subject to approval or rejection by a vote of a majority of the stock represented at meetings of the stockholders of each of such companies called for that purpose, and held within three months after such agreement shall have been adopted by the several boards of directors. But nothing in this section shall be construed to authorize any railroad company in cities of over three hundred thousand population, to lease its rights or franchises to any other company in said cities which owns and operates a road parallel thereto."

At the time the plaintiff in error leased the property of the Rochester City & Brighton Railroad Company, there was in force an act which authorized the lessee to purchase the stock of the lessor corporation, and thereupon to become vested with all its property, franchises, rights and privileges. This act was Chapter 254 of the Laws of 1867, entitled "An act in relation to railroads held under lease" as amended by Chapter 503 of the Laws of 1879, and reads as follows:

"Any railroad corporation created by the laws of this State, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become ex-officio the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of the said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred, shall thereupon vest in, and be held and enjoyed by the said corporation, to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation. The rights of any stockholder not

> so surrendering or transferring his stock shall not be in any way affected hereby, nor shall existing liabilities or the rights of creditors of the corporation, where stock shall have been so surrendered or transferred, be in any way affected or impaired by this act."

It is "the established doctrine of this Court in regard to powers of corporations that they are such, and such only, as are conferred upon them by acts of the Legislature" of the State in which they are organized, and a railroad corporation *unless authorized by the Legislature* cannot lease its road and franchises to another, *nor can a railroad corporation without like authority accept a lease of the road and franchises of another railroad corporation.*

> *Oregon Railway & Navigation Company vs. Oregonian Railway Company*, 130 U. S., 1.

A corporation cannot purchase the stock of another corporation without legislative permission.

> *De LaVergne Refrigerating M. Company vs. German Savings Institution*, 175 U. S., 40.

The plaintiff in error on the 25th day of February, 1890, leased the railroad and franchises of the Rochester City & Brighton Railroad Company, and such lease was made, as stipulated by the plaintiff in error and as found by the Court "*pursuant to the provisions of the Statutes of the State of New York in such case made and provided.*" (Record, page 4.) Thereafter in the year 1890, the plaintiff in error as the lessee of the Rochester City & Brighton Railroad Company acquired the entire capital stock of the Rochester City & Brighton Railroad Company, which was surrendered and transferred to the defendant and a certificate of such surrender and transfer was filed in the office of

the Secretary of the State of New York; and it was stipulated by the plaintiff in error and found as a fact herein, that said stock was acquired *"pursuant to the Statutes of the State of New York in such case made and provided."* (Record, page 44.)

Thus the Rochester City & Brighton Railroad Company practically passed out of existence. Its stock was surrendered and it became a company without any stock. Its estate, property, rights, privileges and franchises vested in the Rochester Railway Company, and its affairs were managed and controlled by the directors of the latter corporation. As was said by this Court in a similar case nothing was left of the Rochester City & Brighton Railroad Company "but the memory of its existence, a mere shadow of a name."

Yazoo & Mississippi Valley Railroad Company vs. Adams, 180 U. S., 1.

It no longer had any road to operate and no property or franchises to control or manage. These were vested in the plaintiff in error, and of course, the plaintiff in error in managing, operating and controlling that property must be deemed to be subject to the statutes which gave it its corporate life, and the authority to acquire the property and franchises of the Rochester City & Brighton Railroad Company. A different question would be presented if the Rochester City & Brighton Railroad Company were here claiming the right to immunity from taxation, and alleging that its contract rights were being impaired; but the Rochester City & Brighton Railroad Company has sold its franchises to the plaintiff in error, and the latter is now exercising and using its franchises and road, and the question is not whether the Rochester City & Brighton Railroad Company had a contract right of exemption from taxation for pavements, but whether if it ever had such immunity, that immunity passed to the plaintiff in error under the Statutes of the State of New York;

and thus the only question that arises is as to the proper construction of those statutes; whether they operated to transfer to the plaintiff all the immunities possessed by the Rochester City & Brighton Railroad Company.

The second assignment of error made by the plaintiff in error herein is as follows :

> "The Court erred in holding that even if such act in connection with such ordinances mentioned in the first assignment herein and its acceptance, and the action thereon by the Railroad Company, did constitute such contract, that portion thereof which exempted the Rochester City & Brighton Railroad Company from paying for new pavements, or any part thereof, in any streets mentioned and referred to in the complaint herein, was personal to such Railroad Company, *and did not pass to the plaintiff in error by virtue of the merger by the plaintiff in error of all the estate, property, rights, privileges and franchises of such Rochester City & Brighton Railroad Company, made under and by virtue of the provisions of Chapter* 254 *of the Laws of the State of New York of* 1867, *as amended by Chapter* 503 *of the Laws of the State of New York of* 1879. (Record, page 113.)"

The act under which the lease was made and the stock acquired by the plaintiff in error is conceded to be constitutional and valid, and the only question at issue is the effect which should be given to that act, and certainly the construction of that statute is one for the State Courts, and their decision thereon must be final.

Central Land Company vs. Laidley, 159 U. S., 103.

Webber vs. Rogan, 188 U. S., 10.

Tampa Water Works Company vs. Tampa, 199 U. S., 241.

Corkran Oil and Development Company vs. Arnaudet, 199 U. S., 182.

In *Central Land Company vs. Laidley,* 159 U. S., 103, the Court says :

> " The appellate jurisdiction of this Court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the Legislature alleged to be repugnant to the Constitution of the United States has been decided by the state court to be valid and not when an act admitted to be valid has been misconstrued by the Court. The statute of West Virginia is admitted to have been valid, whether it did or did not apply to the deed in question; and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity. If this Court were to assume jurisdiction of this case, the question submitted for its decision would be not whether the statute was repugnant to the Constitution of the United States, but whether the highest court of the state has erred in its construction of the statute. As was said by this Court, speaking by Mr. Justice Grier in such a case, as long ago as 1847, ' It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of this Court to review their decisions, or assume jurisdiction over them on the pretense that their judgments have impaired the obligations of contracts. The power delegated to us is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors com-

mitted by their judiciary. *Commercial Bank of Cincinnati vs. Buckingham,* 46 U. S., 5 How. 317, 343; *Lawler vs. Walker,* 55 U. S., 14 How., 149, 154."

It was held by the Court of Appeals in this case that the provision of the Railroad Law requiring street surface railroad companies to pay the cost of paving between their tracks and for two feet outside thereof, is an exercise of the taxing power. Citing *Sioux City Street Railway Company vs. Sioux City,* 138 U. S., 98; *Worcester vs. Worcester Street Railway Company,* 196 U. S., 539. (Record, page, 97.)

"A special statutory exemption or privilege such as an immunity from taxation or the right to fix and determine rates of fares does not accompany the property in its transfer to a purchaser in the absence of express direction to that effect in the statute."

St. Louis & San Francisco Railway Company vs. Gill, 156 U. S., 649.

The same rule is applicable when one corporation is owned and operated by another, pursuant to statutory authority.

People's Gas Light & Coke Company vs. Chicago, 194 U. S., 1.

The question as to whether such a statute operates to transfer the immunity to the purchasing or leasing corporation involves the construction of a State Statute, and raises no federal question.

Grand Rapids & Indiana Railroad Company vs. Osborn, 193 U. S., 17.

In that case it appeared that the plaintiff had acquired under mortgage foreclosure the railroad which it was operating. The statute under which the original railroad company was incorporated provided that railroad corporations might charge three cents per mile

for the transportation of passengers. The plaintiff after acquiring the railroad, became incorporated under a statute which provided that the commissioner of railroads might fix the rate for passenger transportation at a rate of two and one-half cents per mile, and the commissioner of railroads made an order requiring the plaintiff to charge not more than two and one-half cents a mile for the transportation of passengers.

The Court said :

> " That the section of the general railroad law of 1873 making provision for the creation of a new corporation upon the reorganization of a railroad by the purchaser at a foreclosure sale, did not constitute a contract protected by the Constitution of the United States, is concluded by the decision in *New York ex rel Schurz v. Cook*, 148 U. S., 397. In the course of the opinion of this Court it was said (p. 410): ' The plaintiffs in error acquired the properties and franchises of these corporations, which were subject to the taxing power of the state, after the act of 1886 was passed and went into effect. *There is no provision of the law under which they made their purchase requiring them to become incorporated, but desiring corporate capacity they demanded the grant of a new charter under which to exercise the franchises so acquired without compliance with the law of the state existing at the time their application for incorporation was made.* We are clearly of the opinion that the act of 1874, as amended in 1876, set up and relied upon by them, does not sustain such a claim. The provisions of that act do not constitute a contract on the part of the state with either the corporation or the mortgagees, bondholders, or purchasers at foreclosure sale. *They are merely matters of law instead of contract, and the right therein con-*

ferred upon purchasers of the corporate properties and franchises sold under foreclosure of mortgages thereon, to reorganize and become a new corporation, is subject to the laws of the state existing or in force at the time of such reorganization and the grant of a new charter of incorporation. Memphis & L. R. Co. vs. Railroad Commissioners, 112 U. S., 609.'

"It results from the foregoing that Sims, the purchaser of the railroad property in question at the sale under foreclosure, and his associates *could not demand to be incorporated under the statutes of Michigan as a matter of contract right. Possessing no such contract right, they or their privies cannot now be heard to assail the constitutionality of the conditions which were agreed to be performed when the grant by the state was made of the privilege to operate as a corporation the property in question. Having voluntarily accepted the privileges and benefits of the incorporation law of Michigan the company was bound by the provisions of existing laws regulating rates of fares upon railroads, and it is estopped from repudiating the burdens attached by the statute to the privilege of becoming an incorporated body. Daniels vs. Tearney,* 102 U. S., 415, and cases cited."

The decision of the State Court that the alleged immunity did not pass to the plaintiff in error is correct.

It is the established rule of this Court that it will agree with a State Court in its construction of a State Statute, whenever the question decided is balanced with doubt.

Mead vs. City of Portland, 200 U. S., 148.

Tampa Water Works Company vs. Tampa, 199 U. S., 241.

Chapter 503 of the Laws of 1879, under which the plaintiff in error acquired the property and franchises of the Rochester City and Brighton Railroad Company, provided that there should be transferred to it "all the estate, property, rights, privileges and franchises" of the former corporation.

At the time this act was passed, there were in force two other statutes, one providing for the formation of new companies to operate railroads sold under mortgage (Chapter 446 of the Laws of 1876) and another authorizing the consolidation of railroad companies (Chapter 917 of the Laws of 1869). The former provided that the purchasers of railroad properties sold under foreclosure might become a corporation "and shall have all the franchises, rights, powers, privileges and *immunities* which were possessed before such sale by the corporation whose property shall have been sold as aforesaid." The latter act provided that on the consolidation of the corporations, "all and singular the rights, privileges, *exemptions* and franchises of each of said corporations * * * shall be taken and deemed to be transferred to and vest in such new corporation."

Thus when the act was passed under which the plaintiff in error acquired the property of the former corporation, there were statutes in force which provided that on a foreclosure, the purchasers should take the *"immunities"* possessed by the corporation whose property was sold, and that on the consolidation of railroad companies, the new corporation should take the *"exemptions"* possessed by the consolidating companies. The omission of these words from the statute in relation to the rights acquired by the lessee must be deemed to show that the Legislature did not intend that the lessee could acquire any *exemptions or immunities*, and that, therefore, the statute did not operate to transfer to the plaintiff in error any exemption or immunity from taxation possessed by the Rochester City & Brighton Railroad Company.

This Court has decided absolutely that where one statute grants to a company all the rights, privileges and immunities of a former company, and a later statute grants to a corporation the rights and privileges of a former corporation omitting the word "immunities," this omission must be considered as showing the legislative intent that the later statute should not operate to pass any special exemption or immunity, such as an immunity from taxation.

Phoenix Fire & Marine Insurance Company vs. State of Tennessee, 161 U. S., 174.

In that case the Court said :

> " Is there any meaning to be attached to that omission, and if so why? We think some meaning is to be attached to it? The word "immunity" expresses more clearly and definitely an intention to include therein an exemption from taxation than either of the other words. Exemption from taxation is more accurately described as an " immunity " than as a privilege * * * In leaving out a word which, if used, would be regarded as specially and particularly including an exemption from taxation granted to another company, it seems to us that a very grave doubt is cast upon the title of plaintiff in error to the exemption claimed, and in such case the existence of a well founded doubt is equivalent to a denial of the claim."

It must be accepted as the settled doctrine of this Court at the present time that a grant to a corporation of the franchises, rights and privileges of a former corporation does not operate to transfer an immunity from taxation.

Gulf & Ship Island Railway Company vs. Hewes, 183 U. S., 66.

Phoenix Fire & Marine Insurance Company vs. State of Tennessee, 161 U. S., 174.

Wilmington & Weldon Railroad Company vs. Alsbrook, 146 U. S., 279.

Pickard vs. East Tennessee, Virginia & Georgia Railroad Company, 130 U. S., 637.

Chesapeake & Ohio Railroad Company vs. Miller, 114 U. S., 176.

In *Gulf & Ship Island Railway Company vs. Hewes* the Court says :

> " In addition to all this, however, the better opinion is that a suborgation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

In *Phoenix Fire & Marine Insurance Company vs. State of Tennessee*, it appeared that the Phoenix Fire & Marine Insurance Company by the act incorporating it, was granted all the *rights and privileges* of a former insurance company. The Court held that this did not operate to pass to it an exemption from taxation, and after reviewing all the cases, said :

> " If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In *Wilmington & Weldon Railroad Company vs. Alsbrook*, it appeared that by its charter, the Wilmington & Raleigh Railroad Company was authorized to construct a railroad, and it was provided that its property should be exempt from taxation. Afterwards it

was authorized to construct branch roads, and it was declared that "*all the powers, rights and privileges*" conferred on the company in respect to the main road should extend to the said company in the laying out of the branch road. The Court held that this was not sufficient to extend immunity from taxation to the branch road.

In *Pickard vs. East Tennessee, Virginia & Georgia Railroad Company,* the question arose as to whether an immunity from taxation passed under the words "rights, powers and privileges." The Court in holding that it did not said :

> "It is true there are some cases where the term 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the Act have given such meaning to it. The later, and we think the better opinion, is that unless other provisions remove all doubt of the intention of the Legislature to include the immunity in the term 'privileges' it will not be so construed. It can have its full force by confining it to other grants to the corporation.'

In *Chesapeake & Ohio Railway Company vs. Miller,* the question arises as to whether a company which had acquired on a mortgage foreclosure sale the franchises, rights and privileges of a former corporation, succeeded to an immunity from taxation. The Court says:

> "So far as material to the question, its language is : 'The corporation created by, or in consequence of, such sale and conveyance shall succeed to *all such franchises, rights and privileges,* and perform all such duties as would have been had, or should have been performed by the first company but for such sale and conveyance.' It is earnestly contended on behalf of the plaintiff in error that by virtue of this lan-

guage, it is entitled to enjoy the property formerly belonging to the Chesapeake & Ohio Railroad Company, its predecessor, precisely as though it had been incorporated under the charter of that company, and therefore with the exemption from taxation which was conceded to that company. But, broad, general and comprehensive as the language is, we cannot, in reference to the subject matter now in hand, apply it with that force and meaning. *The words used are, it will be observed, 'franchises, rights and privileges,'* * * * *'as would have been* had, * * * 'by the first company, but for such sale,' etc. *There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption.* * * * The subject matter of this legislation was not the original construction of railroads, but the operation of railroads already constructed. The state was not in the attitude of a contractor, soliciting subscriptions of capital, in the formation of companies to undertake the risk of public improvements, for the benefit of the state, with the hazard of loss and perhaps financial ruin to the first promoters, and offering exemptions from taxation as a consideration, by way of contract, for the acceptance of its proposals. It was legislating in reference to enterprises already undertaken, prosecuted and completed by companies originally thus incorporated, and who, by reason of insolvency, had been stripped of their property by creditors and sentenced by the law to dissolution. * * * The contract of the creditors would be fully met, on failure of payment of the stipulated debt, by subjecting to sale the property pledged for its payment, with such rights, franchises

> and privileges only as were necessary for its beneficial use and enjoyment. The immunity from taxation, as we have already said, was not necessarily included in that designation. The debtor corporation, and its creditors combined, could not confer upon the purchasers any rights which were not assignable; and, as no consideration moved to the state for a renewal of the grant, there is no motive for finding by mere construction and implication, what the words of the law have failed to express. That certainly is not a reasonable interpretation for which no sufficient reason can be assigned."

The act under which the plaintiff in error is incorporated provides that it must pave between the tracks and two feet outside thereof of the railroad which it operates, and therefore must be held to prohibit the transfer to plaintiff in error of or exemption from such duty possessed by another corporation.

§ 1 of the act under which the plaintiff in error is incorporated provides :

> " Any number of persons not less than thirteen may make and sign articles of association and form a company for the purpose of constructing, maintaining and operating a street surface railroad for public use in the conveyance of persons and property, in cars, for compensation, in any of the cities, towns or villages of this state, or in any two or more civil divisions thereof. * * * *Such corporations shall* also have all the powers and privileges granted and *be subject to all the liabilities imposed by this act."*

§ 9 of said Act provides :

> " *Every such corporation incorporated under* or constructing, extending or operating a rail-

road constructed or extended under the provisions of this act within the incorporated cities and villages of this state, shall also whenever and as required, and under the supervision of the proper local authorities, have and keep in permanent repair the portion of any street and avenue between its tracks, the rails of its tracks and a space of two feet in width outside and adjoining the outside rails of its track or tracks, so long as it shall continue to use such tracks so constructed, under the provisions of this act."

§ 18 of said act provides :

"All acts and parts of acts, whether general or special, inconsistent with this act are hereby repealed."

Therefore plaintiff in error was incorporated under an act which provides that it shall be subject to all liabilities imposed thereby, one of which liabilities is that it shall pave between its tracks and two feet outside thereof. It acquired its corporate life under this act, and received the authority therefrom to lease the property and franchises of the Rochester City & Brighton Railroad Company, and must be deemed to have accepted its corporate capacity and to have leased the property and franchises of the Rochester City & Brighton Railroad Company subject to the provisions and liabilities of the act under which it was incorporated.

If the act of 1884, under which plaintiff in error was incorporated, and Chapter 503 of the Laws of 1879, permitting railroad corporations holding a lease of another railroads to acquire the stock, property and franchises of the latter, be read together, it will result in the conclusion that the later act modified the former so as to forbid a corporation formed under the Laws of 1884 to acquire by lease or purchase any immunity

from paying the cost of paving between the tracks and two feet outside of the tracks of the railroad operated by it.

It is well settled that a corporation is bound by the provisions of the act under which it is incorporated, and that when it has taken advantage of the provisions of a statute granting it corporate capacity, it assumes all liabilities arising therefrom.

Grand Rapids & Indiana Railway Company vs. Osborn, 193 U. S. 17.

II.

The Right of Plaintiff in Error to Acquire and Hold the Alleged Immunity from Taxation is Subject to the Reserved Power of Alteration, Amendment or Repeal.

Counsel for plaintiff in error in his brief seems to take it for granted that the plaintiff in error occupies the same position in this case as would the Rochester City & Brighton Railroad Company if it were the plaintiff in error. But in this he is mistaken, for all the property, rights, privileges and franchises of the Rochester City & Brighton Railroad Company are now vested in the plaintiff in error who has acquired such property and franchises "*pursuant to the provisions of the Statutes of the State of New York in such case made and provided.*" The plaintiff in error is a distinct corporation organized about twenty-one years later than the Rochester City & Brighton Railroad Company and under a different act of the Legislature; and in order for it to hold the rights and immunities which it now claims it must show some title thereto, and it seeks to do this by virtue of the provisions of certain Statutes of the State of New York.

The act under which the plaintiff in error was incorporated provided that it should be subject to all the liabilities imposed by that act (§ 1); that it should pave between the tracks, the rails of the tracks and two feet outside thereof of the railroad operated by it (§ 9); that it should have the power to lease the road of another railroad company (§ 15). Section 19 thereof reads as follows :

"The Legislature may at any time alter, amend or repeal this Act." This was in accordance with the Constitution and other statutes in force at that time. The Constitution provided :

> "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the Legislature the objects of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed." (Constitution, Art. 8, § 1.)

The Revised Statutes (Title 3, Chap. 18, § 8) provides that "the charter of every corporation which shall hereafter be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

The Legislature pursuant to its reserved power did alter the act under which the plaintiff in error was incorporated, and the provisions of Chapter 252 of the Laws of 1884 were incorporated in the Railroad Law (Chap. 565 of Laws 1890), and Chapter 252 of the Laws of 1884 was specifically repealed; and the provisions of Chapter 254 of the Laws of 1867 relating to railroads held under lease were incorporated in the Railroad Law of 1890, and that Chapter was specifically repealed by the latter law. The Legislature thus in the Laws of 1890, the Railroad Law of the State of New York, incorporated all the provisions of the statutes relating to railroads which it deemed proper to keep in force, and if the plaintiff in error, under Chapter 252 of the Laws of 1884, could acquire and hold the alleged immunity from taxation, it took it under a charter and a law which was subject to alteration, amendment or repeal; and the Legislature has seen fit to repeal the very law under which the plaintiff in error was incorporated, and to re-enact in its place a similar law but with somewhat different provisions as to the duties of corporations with respect to the paving of streets, and under this act the plaintiff in error is charged with the duty of paying the cost of paving cer-

tain portions of the street through which it operates its railroad, and certainly the Legislature under its reserved power had the right to enact this law.

Thus even if the plaintiff in error did acquire from the Rochester City & Brighton Railroad Company the alleged immunity from paying for pavements, it received it subject to the reserved power of the Legislature to alter or amend that right; to take it away; and to add new burdens to the franchise granted to the plaintiff in error.

> *Maine Central Railroad Company vs. State of Maine*, 96 U. S., 499.
>
> *The People of the State of New York vs. Cook*, 148 U. S., 397.
>
> *Stanislaus County vs. San Joaquin & K. R. C. & I. Co.*, 192 U. S., 201.

The case of *Maine Central Railroad Company vs. State of Maine* must be decisive of the case at bar, for in that case it appeared that in the charter of two railroad companies there was a clear conditional limitation upon the power of the State to tax them. The two companies were consolidated and merged into a new company which was formed and succeeded to the powers, privileges and immunities of the former corporations. At the time of the formation of the new company there was a general law which declared that any act of incorporation subsequently passed should at all times thereafter be liable to be amended, altered or repealed at the pleasure of the Legislature.

The Court said :

> "The Maine Central Railroad Company was, upon the consolidation of the original companies, a new corporation, as distinct from them as though it had been created before their existence. The fact that the powers, privileges

and immunities which they had possessed were conferred upon the new company, so far as they could be exercised and enjoyed by it, in no respect affected its character as a distinct body. * * * When this new company came into existence, it became subject to the provisions of the General Law of 1831, which declared that any act of incorporation subsequently passed should at all times thereafter 'be liable to be amended, altered or repealed at the pleasure of the Legislature in the same manner as if an express provision to that effect were therein contained, unless there shall have been inserted in such act of incorporation an express limitation or provision to the contrary.' * *

* There was no limitation in the act authorizing the consolidation, which was the act of incorporation of the new company, upon the legislative power of amendment and alteration, and of course there was none upon the extent or mode of taxation which might be subsequently adopted.

"By the reservation in the Law of 1831, which is to be considered as if embodied in that Act, the State retained the power to alter it in all particulars constituting the grant to the new company formed under it, of corporate rights, privileges and immunities. The existence of the corporation and its franchises and immunities derived directly from the State were thus kept in control."

In the case of *People of the State of New York vs. Cook,* the power of reservation contained in the Constitution and Statutes of the State of New York was under consideration. In that case it appeared that the plaintiffs in error had acquired the property and franchises of an existing railroad upon a mortgage foreclosure sale, and had applied for incorporation and were

refused unless they paid an incorporation tax. They claimed that by the statute under which the mortgage, was made and the sale was held, they had a contract right to succeed to the properties of the defunct corporation, and to become a corporation without the payment of any tax.

The Court said :

> " There is another difficulty in the way of sustaining the claim of the plaintiffs in error in this case. The Constitution of New York providing for the formation of corporations under general laws, reserves to the State the power to alter, change or repeal all such general laws.
>
> " The Revised Statutes of the State (8th ed. vol. 3, chap. 18, title 3, p. 1724, § 8) provides that ' the charter of every corporation that shall be granted by the Legislature shall be subject to alteration, suspension or repeal in the discretion of the Legislature;' and by the General Railroad Law of New York (Laws of 1850, chap. 140, § 48) it is provided that ' the Legislature may, at any time, annul or dissolve any corporation formed under this act, but such dissolution shall not take away or impair any remedy given against such corporation, its stockholders or officers for any liability which shall have been previously incurred.'
>
> " In the case of *People vs. O'Brien,* 111 N. Y., 1, cited by counsel for the plaintiffs in error, while the Court held that it was not within the power of the Legislature to destroy the property rights of a corporation, it was not questioned that the Legislature could destroy the existence of the corporation.
>
> " In the still later case of *New York vs. Twenty-third Street R. Co.,* 113 N. Y., 311, it

was directly held that the right reserved to the Legislature to alter or repeal the charter of a corporation included the right to tax a corporation upon its franchises as such instead of exacting license fees as before prescribed. Earl, J., speaking for the Court there said : 'As it (the Legislature) has the power utterly to deprive the corporation of its franchise to be a corporation, it may prescribe the conditions and terms upon which it may live and exercise such franchises. It may enlarge or limit its powers, and it may increase or limit its burdens.' This construction of the statutes of the state by its highest court is of controlling authority. *Bucher vs. Cheshire R. Co.*, 125 U. S., 555 (31:795); *Gormley v. Clark*, 134 U. S., 338 (33:909), and *Stutsman County v. Wallace*, 142 U. S., 293 (35:1018). The right being thus reserved to the Legislature, under the power to alter or repeal the charter of corporations, not only to terminate their existence, but to impose upon them increased burdens, it cannot be properly asserted that the act of 1886, imposing the tax complained of, was unconstitutional, even though the act of 1874 created a contract with corporations and their mortgagees to whose right, properties and franchises plaintiffs in error have succeeded. The corporations, mortgagees and bondholders under such circumstances acquire their rights subject to the reserved power of the Legislature to enlarge or diminish the franchises conferred, and to increase or reduce the burdens thereon. Purchasers succeeding to properties and franchises of corporations thus situated cannot occupy any better position in respect to their application for a new charter of incorporation.

> "In *Hamilton Gas-light & C. Co. v. Hamilton City*, 146 U. S., 258, 270, it was said by this Court that 'a legislative grant to a corporation of special privileges, if not forbidden by the Constitution, may be a contract; but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, of which has the effect to alter or revoke, the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract. * * * The corporation, by accepting the grant subject to the legislative power so reserved by the Constitution, must be held to have assented to such reservation,' citing, in support of those views, *Greenwood v. Union Freight R. Co.*, 105 U. S., 13, 17. This principle should be especially maintained and applied in cases like the present where the taxing power of the state is involved."

In *Stanislaus County vs. San Joaquin & K. R. C. & I. Company*, 192 U. S., 201, the Court in holding that the rates chargeable by the Water Company fixed in its charter were subject to alteration or repeal under a constitutional provision worded exactly the same as the similar provision of the New York Constitution, said :

> "Assuming there was a contract, we think the rates could be changed under that provision of the Constitution of the State, adopted in 1849, Article Four, § 31, which provided: 'Corporations may be formed under general laws but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.' This Court has had frequent occasion to discuss the

> meaning and extent of the power thus reserved as it exists in about all the states either by constitutional or statutory provisions."

And after reviewing numerous cases upon this point, the Court further said :

> "We are quite clear that, even assuming there was a contract, the Legislature, nevertheless, had the power to so alter and amend the act of 1862, as to provide for the fixing of rates as set forth in the act of 1885."

Under these decisions it must be clear that the plaintiff in error acquired its charter and acquired the right to lease the property and franchises of the Rochester City & Brighton Railroad Company under a law which was subject to alteration, amendment or repeal, and that under this reserved power the Legislature had the right to take from it any special immunities or privileges which it possessed and to impose upon it such additional burdens as it deemed desirable.

III.

The Act of 1869 Was Passed to Grant Relief to the Rochester City & Brighton Railroad Company, Was Based Upon No Consideration, and Was a Gratuity Repealable at Pleasure.

The original Rochester City & Brighton Railroad Company was incorporated on the 31st day of May, 1862, pursuant to the provisions of Chapter 140 of the Laws of 1850. (Record, page 30.)

This railroad corporation applied to the Common Council of the City of Rochester for permission to construct a street railroad in the City of Rochester, as the act under which it was incorporated provided that it could not be constructed "in, upon or across any streets in any city without the assent of the corporation of such city." (§ 28, subd. 5.) The Common Council on the 24th day of June, 1862, passed an ordinance granting to said corporation the right to construct a railroad, "upon the terms, conditions and stipulations hereinafter prescribed," and among the prescribed conditions were the following :

> "Said company shall, under the terms of and as required by the Common Council of the City of Rochester, improve with suitable material, as such Common Council shall direct and in a proper manner, between its tracks, the rails of its tracks and for two feet and four inches outside thereof. * * *
>
> "The said Railroad Company may charge and collect from every person on entering any of their cars or carriages for riding any distance upon said road on the same continuous route, a sum not exceeding five cents, except children under five years of age accompanied by parents

or other persons having them in charge, such children to ride free. * * *

"It is hereby reserved to the Common Council of the City of Rochester the right to make such further orders, rules and regulations in relation to the construction, repairs and operation of said railroad as from time to time may be deemed necessary to protect the interests of said city and the safety, welfare or accommodation of the public." (Record, pages 31, 32.)

Said ordinance further provided that the grant should be formally accepted by the Railroad Company within sixty days from the date of the passage of the resolution.

On the 8th day of July, 1862, the Rochester City & Brighton Railroad Company "*duly accepted the grant subject to the provisions and restrictions therein contained,* and such acceptance was duly approved by the City Attorney of the City of Rochester." (Record, page 33.)

This ordinance with the provisions and conditions thereunto annexed, upon its acceptance by the Rochester City & Brighton Railroad Company, became a contract between the city and said Railroad Company, and this has been distinctly held by the Court of Appeals of the State of New York.

In *Mayor, etc., of City of Troy vs. The Troy & Lansingburgh Railroad Company,* 49 N. Y., 657, it appeared that a railroad incorporated under the same act as the Rochester City & Brighton Railroad Company, was granted leave to construct a road through certain streets in Troy by an ordinance passed in August, 1860, in which ordinance certain conditions were imposed, among which was that the company should keep in repair the pavement between the tracks and for a distance of eighteen inches outside of each track, and to cause

the snow and ice to be removed therefrom so as to afford a safe and unobstructed passage to sleighs and wagons.

It appeared that the Railroad Company let snow and ice accumulate between its tracks and made dangerous excavations by digging through the ice and snow and rendered the street unsafe, in consequence of which a person passing in a sleigh was thrown out and injured. The injured person subsequently recovered damages against the city, and thereupon the city sought to recover the amount of the judgment from the Railroad Company. The headnote of the case in the Court of Appeals is as follows :

> " By the acceptance by a railroad corporation of a license from a municipal corporation to lay and operate its tracks in the streets of the latter, the terms and conditions upon which the license is granted become a contract between the parties."

The Court of Appeals has held that the conditions which may be imposed by a municipal corporation are such only as relate to matters over which the Legislature has not retained control.

> *Matter of Kings County Elevated Railroad Company*, 105 N. Y., 97, 114.

In that case the Court said :

> " However it may be with this condition, the others are neither reasonable nor lawful. They relate to matters over which the Legislature and the Commissioners have entire control. The Statute determines how the damages of the land owner shall be ascertained and confers upon the Commissioners sole power and jurisdiction to determine when the various portions of the road shall be completed. Their action is as the action of the Legislature, and can neither

be superseded nor in any way affected by that of any other body; but here the resolution of the Common Council is wholly repugnant to the Statute in one case and to the condition imposed by the Commissioners in the other."

The case of *Potter vs. Collis*, 156 N. Y., 16, cited by counsel for the plaintiff in error, does not decide anything to the contrary and no question was raised in that case as to whether the Common Council when it could lawfully grant permission to construct a street railroad had the right to annex conditions thereto. The only question was as to whether the grant of such a right to individuals was lawful.

The Court in that case, at page 30, says :

"What the Common Council or the corporation had attempted to grant to Pettigrew and his associates was a right to an exclusive interest in the streets, and that was beyond the power of either. It could not be sustained under any theory, either of a franchise or of a license. The Common Council could not divest the municipal corporation of that control over the streets, which was held by it in trust for the public. All that the municipal corporation could do within the provisions of the General Railroad Act of 1850, was to assent to the construction of a railroad. * * * It undertook to grant a right which, if effective, operated to invest private parties with an exclusive interest in its streets. * *

"The Common Council then, being without power to confer any such right under its resolution, the consideration for the contract subsequently executed failed, and it was of no force or effect."

Therefore the franchise of the original Rochester City & Brighton Railroad Company required it to pave

between its tracks for two feet and four inches outside thereof.

Thereafter the property, rights, privileges, franchises and interests of the original Rochester City & Brighton Railroad Company were sold on mortgage foreclosure sale to Chauncey B. Woodworth, who associated with himself other persons, and on the 5th day of March, 1868, filed articles of association incorporating the new Rochester City & Brighton Railroad Company. (Record, pages 33, 34.) The new company thereupon *petitioned* the Common Council of the City of Rochester "*protesting against the onerous conditions of § 2 of the said resolution of* 1862." (Record, page 34.)

"Thereafter and for a space of upwards of a year, the question was debated in the Common Council, committees appointed, and various hearings had," and on the 12th day of January, 1869, the ordinance of 1862 was amended so as to contain the following provision :

> "Whenever it becomes necessary to improve by ordinance or otherwise, any of the streets through which their track is laid, with a new or permanent improvement, said Company shall not be required to make any part or portion thereof, nor bear any part or portion of the expense of making the same *during the term of five years from the adoption of this ordinance.*
> * * *
>
> "Said company may charge and collect from every person on entering any of their cars or carriages, for riding any distance upon said road, to or from the extremities at either railway depot, a sum not exceeding five cents, except children under five years of age, accompanied by parents or other persons having them in charge. Such children to ride free and except also that said company shall not charge nor re-

> ceive from children under twelve years of age, more than three cents for any of above distances." (Record, pages 34 & 35.)

Shortly after the amendment of the ordinance, *an act was drawn by the Rochester City & Brighton Railroad Company* which was transmitted to the Common Council of the City of Rochester by the Mayor thereof, with a written request that a resolution be passed approving the act and requesting its passage by the Legislature. Thereupon the Common Council passed the following resolution :

> "Resolved, That the Clerk of this Board be authorized to transmit a copy of the bill relating to street railroads presented by the Mayor to this Board to the Legislature *requesting that body to legalize the action of the Common Council by the passage of said act.*"

On the 12th day of February, 1869, said act was passed by the Legislature of the State of New York and signed by the Governor of the State. (Record, page 35.)

It thus appears that after the property and franchises of the old Rochester City & Brighton Railroad Company had been sold, the purchasers thereof became incorporated on the 5th day of March, 1868. The amendment to the ordinance was passed on the 12th day of January, 1869, and the act of the Legislature under which the immunity is claimed herein, was adopted on the 12th day of February, 1869, thus showing that the new company was in possession of and operating a railroad in the City of Rochester for upwards of a year before the act relied upon was passed.

Chapter 34 of the Laws of 1869 reads as follows :

> "§ 1. **The Rochester City & Brighton Railroad Company is hereby authorized and empowered to maintain and operate a railroad in**

all of the streets of the City of Rochester in which it has a track now laid, and with the permission of the Common Council of said city in such other streets in said city as it shall elect to use for that purpose; and with the consent of said Common Council to lay a double track in any such street or streets, and the said company shall not be bound or required to construct and operate a railroad in any street of said city where there is now no track.

"§ 2. Said company, by and with the consent of the Common Council of said city, may at any time hereafter abandon the use of any street now used or which may hereafter be used, by it for the operation of its road, and upon such abandonment shall take up its track and restore such street to as good condition as it was before the removal of such track."

§ 3 provides a mode for acquiring real estate by condemnation.

§ 4 provides that "said company may and is hereby authorized to charge, collect and receive from each and every passenger for riding any distance upon its said road towards or from the intersection of Buffalo Street with Main and Exchange Street in said city, the sum of five cents, except that children under twelve years of age shall only be required to pay three cents fare, and children under five years of age accompanied by parents or other persons having them in charge, shall ride free."

§ 5 provides that "said company shall put, keep and maintain the surface of the streets inside the rails of its track in good and thorough repair, under the direction of the committee on streets and bridges of the Common Council of said City of Rochester; but whenever any of said streets are by ordinance or otherwise permanently improved, said company shall not be required

to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof."

§ 6 provides that "this act shall not be construed as in any way impairing the force or effect of the resolution or ordinance of the Common Council of the City of Rochester, entitled 'An ordinance in relation to street railroads' passed June 24th, 1862, and the amendments thereof, except as is herein specifically provided." (Record, pages 17, 18).

This act is entitled "An act for the relief of the Rochester City & Brighton Railroad Company" (Record, page 17), and all its provisions show that it was not adopted for the purpose of imposing any additional burdens on the railroad, but to relieve it from the burdens imposed upon it by its franchise.

The first section of the act provides that the company may maintain its railroad in the streets in which its tracks are now laid, and shall not be bound to construct a railroad in any street where there is no track. This provision was inserted in the Relief Act merely to prevent forfeiture which the Statute of 1850 provided might be enforced if the railroad were not completed within five years from the time of incorporation (Laws 1850, Ch. 140, § 47), and, of course, this was not the grant of a new franchise, but was merely to prevent a forfeiture of the old one. Consequently, the Court of Appeals was entirely justified in holding as it did that the Act of 1869 was not the grant of a new franchise. (Record, page 99).

Section one of the act in addition provides that the railroad may extend its tracks in other streets with the consent of the Common Council, and this was merely the regulation of an existing right. The articles of incorporation of the Rochester City & Brighton Railroad Company provided that it was for the purpose of ope-

rating a railroad in the City of Rochester heretofore constructed, maintained and operated by the Rochester City & Brighton Railroad Company wherein said railroad is now laid and run "*and in and through such other streets as the public interests may hereafter require.*" (Record, page 34).

Section 23 of the act under which the company was incorporated (Ch. 140, L. 1850) provides that the directors may by a vote of two-thirds of their number at any time alter or change the route or any part of the route of their road, "and no such alteration shall be made in any city or village after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the Common Council of said city or trustees of said village." The Relief Act provided that extensions might be made with the consent of the Common Council, which, of course, had the effect of requiring a majority vote instead of a two-thirds vote of the Common Council in order for the company to obtain the right to extend its road through any other street or streets in the City of Rochester; and certainly this was a mere regulation of existing right enjoyed by the company.

Section two of the act provides for the abandonment of the railroad in any street with the consent of the Common Council, which, of course, imposed no burden upon the Railroad Company.

Section three merely enlarged the powers of condemnation of the Railroad Company.

Section four prescribed the same rate of fare as the Common Council under its reserved power had prescribed in the amendatory ordinance, and this certainly was no additional burden on the Rochester City & Brighton Railroad Company, as the Legislature in the act under which it was formed had reserved the power to alter the rates of fare, the provision being "The

Legislature may when any such railroad shall be open for use, from time to time, alter or reduce the rate of freight, fare or other profits upon such road." (Laws 1850, Ch. 140, § 33.)

The provisions as to repairs and repavements certainly lightened the burdens imposed upon the Railroad Company in the ordinance of the Common Council granting the franchise.

It was conceded and found herein that after the passage of the Act of 1869 "the said Rochester City & Brighton Railroad Company continued to maintain and operate its street surface railroad under the general statutes of the State of New York." (Record, pages 35 & 36.) This concession is important as showing that the Act of 1869 was not the grant of a new franchise and did not grant new powers for the operation and extension of the railroad, but merely regulated the powers possessed by the Rochester City & Brighton Railroad Company under its charter.

An analysis of this Act thus clearly shows that it did not confer upon the Rochester City & Brighton Railroad Company any new franchises, and did not impose upon it any additional burdens, but that it was passed for the purpose, as its title shows, of relieving said Railroad Company from existing burdens and that in fact is the only effect which can be given to the act.

The Railroad Company was relieved from the danger of forfeiture of its franchises; it was permitted to extend its tracks with the consent of a majority of the Common Council instead of two-thirds thereof. Its mode of condemning lands was made less difficult. It was exempted from paying for pavements, and the rates of fare were fixed as prescribed in the amendatory ordinance of the Common Council and added no burden which the Legislature did not have the right to impose, as it had reserved to itself the power to regulate the rates of fare.

It will be observed that at the time the act of 1869 was passed a street railroad had been constructed in the City of Rochester and was in operation. That the Rochester City & Brighton Railroad Company was then the owner of said railroad and operating it, and so, of course, said act was not passed for the purpose of inducing people to invest their money in the construction of a railroad for the benefit of the public. The money had been invested and the road had been constructed and was in operation, and the State as a mere bounty to the Rochester City & Brighton Railroad Company passed the act in question. When that act was passed no new duties were imposed upon the railroad company, and nothing was promised or pledged by it. All that the act accomplished was to relieve the Railroad Company from certain burdens and thus the act was a mere gratuity and repealable at any time.

Grand Lodge vs. City of New Orleans,
166 U. S., 143.

In that case the Court said :

> " The only question in this case is whether the act of 1855, exempting the hall of the Grand Lodge from state and parish taxation, ' so long as it is occupied as a Grand Lodge of the F. & A. Masons,' constitutes a contract between the State and the complainant, or was a mere continuing gratuity which the Legislature was at liberty to terminate or withdraw at any time, and which the state did subsequently withdraw by the adoption of a Constitution, which secured the exemption of the property of 'all charitable institutions; * * * provided, the property so exempted be not used or leased for the purposes of private or corporate profit or income.' It appeared in this case that, during the years in which the assessments complained of were made, a part of the ground floor of the exempted prop-

erty was rented for stores; that some of the rooms were rented for other like purposes, and that from these sources a large amount of corporate income had been realized, although that income was devoted to charitable purposes.

"If the act of 1855 be regarded as a contract within the case of *Dartmouth College v. Woodward,* 17 U. S., 4 Wheat., 518, then it is clear that the exemption from taxation was valid, and beyond the power of the Legislature to abrogate.

> *Piqua Branch of State Bank v. Knoop,* 57 U. S., 16 How., 369; *New Jersey vs. Wilson,* 11 U. S., 7 Cranch., 164; *Gordon vs. Appeal Tax Court,* 44 U. S., 3, How., 133; *Dodge vs. Wolsey,* 59 U. S., 18 How., 331; *Jefferson Branch Bank vs. Skelly,* 66 U. S., 1 Black, 436; *McGehee vs. Mathias,* 71 U. S., 4 Wall., 143; *Wilmington & W. R. Co. vs. Reid,* 80 U. S., 13 Wall., 264; *Humphrey vs. Peques,* 83 U. S., 16 Wall., 244; *Farrington vs. Tennessee,* 95 U. S., 679; *New Jersey vs. Yard,* 95 U. S., 104.

"To make such a contract, however, there is the same necessity for a consideration that there would be if it were a contract between private parties. If the law be a mere offer of a bounty, it may be withdrawn at any time, notwithstanding the recipients of such bounty may have incurred expense upon the faith of such offer. Thus the Legislature of the State of Michigan, desiring to encourage the manufacture of salt, which had been recently discovered in the Saginaw Valley in 1859, offered exemption from taxation and a bounty of 10 cents per bushel to all individuals, companies, or corporations

formed for the purpose of boring for and manufacturing salt. It was held in *Salt Mfg. Co. v. East Saginaw,* 80 U. S., 13 Wall, 373, that, if the salt company plaintiff had been incorporated by a special charter, containing the provision that its property should be exempt from taxation, and that charter had been accepted and acted upon, it would have constituted a contract; but that this was a bounty offered to all corporations and individuals who should manufacture salt, and there was no pledge that it should not be repealed at any time; that as long as it remained a law, every individual or corporation was at liberty to avail himself or itself of its advantages, by complying with its terms and doing the things which it promised to reward; but was also at liberty at any time to abandon such a course; that it was a matter purely voluntary upon both sides—giving to one party the power to abandon the manufacture of salt, and to the other to repeal the exemption from taxation and the bounty of 10 cents per bushel. The consequence of a different decision in this case might easily have become disastrous, since the arguments which were urged upon this Court at that time would have been equally forceful at any time thereafter, and the state might have found itself bound by a perpetual pledge to pay 10 cents upon every bushel of [illegible] thereafter manufactured by the companies, which had embarked in the enterprise under the encouragement of the bounty. A like ruling was made in *Welch v. Cook,* 97 U. S., 541, in which an act of the Legislature of the District of Columbia, exempting from general taxation for ten years such real and personal property as might be employed within the District for manufacturing purposes, did not create an irrepealable contract

with the owners of such property, but merely conferred a bounty, liable at any time to be withdrawn.

"Complainant, while admitting the soundness of this proposition, claims that the requisite consideration existed in the deed by which the property was acquired, wherein the Grand Lodge solemnly declared and proclaimed said purchase to be made for the purpose and object of creating a fund for charitable purposes, in the relief of worthy distressed members of the order, their wives, children and families; and solemnly pledged itself that as soon as the said property should be paid for, the whole of the revenue which might be derived from it, after deducting necessary and unavoidable expenses on its account, should be devoted to those objects.

"This consideration, however, was not one upon the faith of which the Legislature granted the exemption, since the deed had already been in existence for two years, and the property had been purchased under the resolution of the lodge, adopted January 27, 1853, to the same effect as the above recital in the deed. While subscriptions for the purchase of the property may have been obtained upon the faith of this resolution, it cannot be said to have constituted a consideration for the exemption. The alleged contract for exemption was not contained in the charter—as in other cases where such exemption has been sustained—since the lodge had already pledged its revenues to charitable purposes; and when the act was passed it gave no additional pledge, and promised nothing which it had not already promised and was bound in honor to perform. If additional subscriptions were obtained upon the faith of the act, the subscribers were bound to take notice of the fact that the

Legislature was at liberty to repeal the act at any time, or, that the people might, in the exercise of their sovereign power, nullify it by an amendment to the constitution.

"In *Home for the Friendless v. Rouse*, 75 U. S., 8 Wall, 430, relied upon by the plaintiff in error the exemption was contained in the original charter of the Home for the Friendless, which purported in its preamble to be granted for the purposes of encouraging the undertaking, and enabling the parties engaged therein more fully and effectually to accomplish their laudable purpose. The exemption was offered, not in view of a consideration which had already passed, but for the purpose of inducing the incorporators to accept the charter and to carry out the enterprise.

"So, in *St. Anna's Asylum v. New Orleans*, 105 U. S., 362, the institution was incorporated under an act of the General Assembly, which declared that all the property belonging to the institution should be exempted from all taxation. The question turned upon the exemption of certain property which was devised to it twenty years after it was incorporated, the revenues of which were applied to enable it to carry on its work; but it was held that the contract applied not only to property in existence when the charter was granted, nor only to that which was in existence when the Constitution of 1868 was adopted, but to all which might afterward be acquired in the due fulfillment of the purposes of the institution.

"We are of opinion that the act in question in this case was one which the Legislature might properly enact as a matter of public policy, and in aid of a beneficent purpose; but that it was a

mere gratuity or bounty which it was competent at any time to terminate, and that this was done by Const. 1879, Art. 207. The case is practically upon all fours with that of *Christ Church vs. Philadelphia County,* 65 U. S., 24 How., 300, in which the Legislature of Pennsylvania enacted, that 'the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the City of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes.' Eighteen years thereafter the Legislature enacted that all property belonging to any association, then exempt from taxation, other than that in actual use and occupation of such association, should thereafter be subject to taxation. It was held that this last law was not in violation of the Constitution of the United States; that the former act of 1833 was a mere privilege existing *bene placitum,* and might be revoked at the pleasure of the sovereign. It would seem from this case that the hospital had been incorporated long before the act containing the exemption was passed, as that act recited that the hospital 'had for many years afforded an asylum for numerous poor and distressed widows,' and that the exemption was granted on account of its means being curtailed by decay of the buildings, and the increased burden of taxation. So in *Tucker v. Ferguson,* 89 U. S., 22 Wall., 527. And in *West Winconsin R. Co. v. Trempealeau County Supers.,* 93 U. S., 595, it was held that an act of the Legislature exempting property of all railroads from taxation was not a contract to exempt unless there were a consideration for the act; that the promise of a gratuity, spontaneously made, may be kept, changed, or recalled at pleasure, and that this rule applied to the agreements of states, made

without consideration, as well as to those of persons. See also *Newton v. Mahoning County Comrs.*, 100 U. S., 548, 561, and *People, Cunningham vs. Roper*, 35 N. Y., 629, wherein a law, providing that persons who had served seven years in the militia and had been honorably discharged, were entitled to perpetual immunity from taxation to the extent of five hundred dollars each, was held to be repealable at any time by the Legislature.

> "The act of 1855, now in question, clearly falls within the latter class of gratuities or bounties, which are subject to the will of the Legislature, and may be withdrawn at any time."

In *Stanislaus County vs. San Joaquin & K's R. C. & I. Co.*, 192 U. S., 201, it appeared that an irrigation company was incorporated under statutes granting it power to furnish water and to collect water rents, which should be subject to regulation by the Board of Supervisors, but which should not be reduced so low as to yield less than one and one-half per cent. per month upon the capital invested. After the company had been formed and had been in actual operation for a number of years, the Legislature passed another act providing that the supervisors might fix the water rates so that the annual receipts of the corporation should not be less than six nor more than eighteen per cent. upon the value of all the property of the corporation actually used in its business.

This Court held that as the first act did not contain a provision guaranteeing to the corporation that its rates would never be altered, the Legislature retained the right to thereafter reduce the amounts which the water company should receive, and said :

> "It seems to us that language of this nature cannot properly be construed as a promise or

pledge that the limitation as to rates may not be altered at any time when, in the judgment of the Legislature, it may be proper so to do. * * * It would be most unreasonable to suppose that it was intended by any such legislation to forever thereafter tie the hands of the state in regard to all companies organized under the Act of 1862, and before the passage of the Act of 1885. The authority given by the Act of 1862 enabled the Board of Supervisors to conditionally regulate the rates. There is no promise made in the act that the Legislature would not itself subsequently alter that authority. The state simply authorized its agents, the Boards of Supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied that the state might not thereafter authorize the boards to reduce them, or that it might not itself do so directly. * * * In our belief the language of the Act of 1862 does not and was not intended to form a contract, but simply amounted to the statement of the then pleasure of the Legislature, to so remain until subsequently altered by it."

Then after reviewing at great length numerous authorities, the Court further says :

"Sufficient cases have been cited to show that language quite as strong as that used in the Act of 1862 does not amount to a contract. It is true that the cases cited involved questions of alleged contracts for exemption from taxation, in regard to which it has been said that no presumption exists in favor of a contract by a state to exempt lands from taxation, and that every reasonable doubt should be resolved against it. * * * To regulate or establish rates for which water will be supplied is in its nature the execu-

tion of one of the powers of the state and the right of the state so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain."

The ordinance adopted by the Common Council in 1869 amending the ordinance of 1862, *limited the immunity* from paying the cost of pavements granted to the Company *to the term of five years,* and the resolution passed by the Common Council requesting the Legislature to pass the Act of 1869, expressly recited that the Legislature was requested to pass the act "to legalize the action of the Common Council."

This shows clearly that the City of Rochester never consented to permanently exempt the Rochester City & Brighton Railroad Company from paying a share of paving streets in which it was operating its railroad.

The Act of 1869 did not place any limitation of time upon the immunity granted to the Rochester City & Brighton Railroad Company but it *did provide that that act should not be construed as impairing the force or effect of the ordinance of the Common Council entitled "An ordinance in relation to street railroads" passed June* 24, 1862, *and the amendments thereof,* except as it is herein specifically provided; and thus the act of 1869 must be construed as having read into it the ordinance of 1862 and the amendment adopted in 1869, and *with these ordinances read into it, the exemption from paying a share of the cost of pavements granted to the Railroad Company by the Act of* 1869 *is limited to the term of five years.* Certainly this act does not clearly express an intention to forever exempt the Railroad Company from paying a certain share of the cost of pavements; and the act granting this exemption must be construed strictly against the grantee and in favor of the public, and whatever is not specifically granted in that act must be deemed to be withheld; and if the words of

the act leave it doubtful as to whether it intended to grant permanent exemption, this doubt must be held to be equivalent to a denial of a permanent exemption.

Knoxville Water Company vs. Knoxville, 200 U. S., 22.

People of State of N. Y. ex rel Met. St. Ry. Co. vs. Tax Com'rs, 199 U. S., 1.

It was conceded and expressly found herein that the Act of 1869 "*was drawn by the Rochester City & Brighton Railroad Company*". (Record, page 35). When a legislative grant is drawn by the party interested, the strictest rule of construction will be applied and no rights of the state will be deemed to pass by inference or presumption.

Blair vs. Chicago, 201 U. S., 400.

In that case the Court said:

> "Legislative grants of this character should be in such unequivocal form of expression that the legislative mind may be distinctly impressed with their character and import, in order that the privileges may be intelligently granted or purposely withheld. *It is matter of common knowledge that grants of this character are usually prepared by those interested in them, and submitted to the Legislature with a view to obtain from such bodies the most liberal grant of privileges which they are willing to give.* This is one among many reasons why they are to be strictly construed."

IV.

The Act of 1869 Could Not Constitute a Contract Unless It Were an Amendment to the Charter of the Rochester City & Brighton Railroad Company, and If It Became a Part of the Charter of That Company It Was Subject to Amendment, Alteration or Repeal at the Will of the Legislature.

If the act of 1869 were passed merely as a gratuity to relieve a railroad constructed and in operation from burdens imposed upon it by its franchise, certainly it did not constitute a contract with the Railroad Company and the only way in which it could be held to be a contract would be by giving effect to it as an amendment to the Charter of the Company, and if it became a part of the charter of the Rochester City & Brighton Railroad Company, it was subject to alteration, amendment or repeal.

The New York Constitution of 1846 (Art. 8, §1) provides that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where in the judgment of the Legislature the object of the corporation cannot be attained under general laws. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

The General Railroad Statute, under which the Rochester City & Brighton Railroad Company was incorporated (Laws of 1850, Chap. 140, §1) provides that all persons who have subscribed articles of association shall be a corporation and shall "be subject to the provisions contained in Title 3 of Chapter 18 of the first part of the Revised Statutes, except the provisions contained in the seventh section thereof."

Title three, Chapter 18 of the first part of the Revised Statutes, §8 provides as follows:

> "The charter of every corporation that shall hereafter be granted by the Legislature, shall be subject to alteration, suspension or repeal in the discretion of the Legislature."

§48 of Chapter 140 of the Laws of 1850 contains the following provision:

> "The Legislature may at any time annul or dissolve any corporation formed under this act."

The Legislature of the State of New York under its reserved right had the right at any time to amend, alter or repeal the charter of the Rochester City & Brighton Railroad Company, and to impose further and additional duties and burdens upon it.

Sioux City Street Railway Company vs. Sioux City, 138 U. S. 98.

The People ex rel. Schurz vs. Cook, 148 U. S., 397.

Stanislaus County vs. San Joaquin, 192 U. S., 201.

V.

The Plaintiff in Error If It Acquired from the Rochester City & Brighton Railroad Company Any Immunity from Paying the Cost of Paving, Has Contracted That Right Away and Has Waived It by Extending Its Railroad Under the Provisions of the Present Railroad Law.

The plaintiff in error contends that this question cannot be reviewed by this Court, but this Court will always determine for itself the existence or non-existence of a contract which is claimed to have been impaired, and if a different contract has been substituted, or the one claimed to have been impaired has been waived or abandoned, the former contract does not exist and so cannot be impaired, and necessarily this Court must first determine whether there is a contract to be impaired; and in this case before that question can be determined, it must be decided whether or not the alleged contract relied upon by the plaintiff in error has been wiped out of existence by another contract, or by waiver.

A contract may be abandoned by the execution of a later contract.

> *U. S. International Contracting Company vs. Lamont,* 155 U. S., 303.

All rights whether arising from contract, statute or a constitution may be waived.

> *Peopde ex rel. McLaughlin vs. Police Comrs.,* 174 N. Y., 450-456.

On the 11th day of December, 1894, the plaintiff in error presented to the Common Council of the City of Rochester a petition praying for the location of its tracks, saying that there was some doubt as to whether

they legally existed in their present location. (Record, pages 47, 48) The Common Council on the 31st day of December, 1894 passed an ordinance confirming the location of the tracks of the plaintiff in error upon certain conditions, and directed that a contract be entered into between the city and the Rochester Railway Company in accordance with the provisions of the resolution. (Record, page, 48.)

Thereafter a contract was entered into in which the Railway Company agreed "to accept, and in each and every thing and particular, well and truly comply with each and all of the provisions and conditions contained and made in the following and accompanying resolutions as adopted by the Common Council of said city on the 31st day of December, 1894." (Record, page 49.) Annexed to and made a part of the contract was the resolution of the Council ratifying the location of the railroad and tracks of the plaintiff in error, upon the following conditions:

> First—That the provisions of Article Four of the Railway Law of the State of New York, being an act in relation to railroads, constituting Chapter 39 of the General Laws of the State of New York, be complied with."

Article Four of the Railroad Law at that time contained §98 thereof which reads as follows:

> "Every street surface railroad corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks and two feet outside of its tracks, under the supervision of the proper local authorities, and whenever required by them to do so, and in such manner as they may prescribe." (Chap. 565 of Laws of 1890, as amended by Chap. 676 of Laws of 1892.)

The resolution of the Common Council ratifying the location of plaintiff in error's tracks and the contract entered into pertaining thereto, contained a provision that all former ordinances, grants and resolutions in relation to street railroads should remain in force. (Record, page 51.) But, of course, this can be construed as meaning all former agreements and ordinances so far as not inconsistent with the contract in which they were contained. If it had been intended that the ordinance and contract should not impose upon the Railway Company the duty of complying with Article Four of the Railroad Law, this clause would have been stricken out. The fact that it was allowed to remain shows that it was intended to have force and effect, and the special provision imposing the duty upon the railroad company of complying with Article Four of the Railroad Law should be construed as an exception to the general provision as to the repeal of former ordinances and thus force and effect will be given to all the words of the contract and ordinance.

It is a well settled rule of construction of contracts and statutes that special provisions will not be held to be limited or modified by general provisions later appearing, and that the particular provision will be construed as an exception to the general provision.

Wormser vs. Brown, 149 N. Y., 165-170.

It is conceded that after the passage of Chapter 252 of the Laws of 1884, the Rochester City & Brighton Railroad Company obtained from the municipal authorities of the City of Rochester various consents to extend its tracks "on the express conditions that the provisions of Chapter 252 of the Laws of 1884 pertinent thereto shall be complied with;" and that the plaintiff in error since it acquired the property and franchises of the Rochester City & Brighton Railroad Company has received from the municipal authorities of the City of

Rochester various consents to extend its railroad in the various streets in the City of Rochester upon condition "that the provisions of Article Four of the Railroad Law pertinent thereto shall be complied with." (Record, pages 46, 47).

Chapter 252 of the Laws of 1884, §9, provides:

> "Every such corporation incorporated under, or constructing *extending* or operating a railroad constructed or *extended* under the provisions of this act within the incorporated cities and villages of this state" shall keep in permanent repair between the tracks and two feet outside thereof.

Chapter 565 of the Laws of 1890, §90 provides:

> "A corporation organized for the purpose of building and operating or *extending* a street railroad or any of its branches, for public use in the conveyance of persons and property in cars for compensation, upon and along any street, avenue, road or highway, in any city, town or village, or in any two or more civil divisions of the state, must comply with the provisions of this article."

§98 of the same article provides:

> "Every such corporation so long as it shall continue to use any of its tracks in any street, avenue or public place in any city or village, shall have and keep in permanent repair, etc."

Thus the laws under which both the Rochester City & Brighton Railroad Company and the plaintiff in error have made extensions, provide that any railroad corporation making such extensions should be bound thereby, and should be obliged to pave certain portions of streets through which their railroads run, and the companies having both availed themselves of the privileges granted by this act must be also subject to the liabilities imposed thereby.

VI.

It Is Respectfully Submitted That the Judgment of the Supreme Court of the State of New York Should Be Affirmed.

WILLIAM W. WEBB,
Corporation Counsel,
Attorney and Counsel for Defendant in Error.

BENJAMIN B. CUNNINGHAM,
of Counsel.

Supreme Court of the United States.

No. 156.—October Term, 1906.

Rochester Railway Company, Plaintiff in Error, vs. City of Rochester. } In error to the Supreme Court of the State of New York.

[March 25, 1907.]

The defendant in error brought an action against the plaintiff in error, a street surface railroad corporation, hereinafter called the Rochester Railroad, to recover $18,274.02, the expense of making new pavements of two streets within the space between the tracks, the rails of the tracks and two feet in width outside the tracks of the railroad. The action was brought under section 98 of chapter 39 of the General Laws of New York, which was enacted in 1890, and is as follows:

"Every street surface railroad corporation, so long as it shall continue to use any of its tracks in any street, avenue or public place, in any city or village, shall have and keep in permanent repair that portion of such street, avenue or public place between its tracks, the rails of its tracks and two feet in width outside of its tracks, under the supervision of the proper local authorities and whenever required by them to do so and in such manner as they may prescribe. In case of the neglect of any such corporation to make pavements or repairs after the expiration of thirty days' notice to do so the local authorities may make the same at the expense of such corporation. . . ."

The Rochester Railroad was incorporated on February 25, 1890, under a law of New York enacted May 6, 1884. Chap. 252, Laws of New York, 1884. That law authorized the formation of street surface railroad corporations and provided that they should "have all the powers and privileges granted and be subject to all the liabilities imposed by this act." Among the liabilities was that imposed by section 9 of the act, which is as follows:

"Every such corporation incorporated under, or constructing, extending, or operating a railroad constructed or extended, under the provisions of this act, within the incorporated cities and villages of this State, shall also, whenever and as required and under the supervision of the proper local authorities, have and keep in permanent repair the portion of every street and avenue between its tracks, the rails of its tracks and a space of two feet in width outside and adjoining the outside rails of its track or tracks, so long as it shall continue to use such tracks, so constructed, under the provisions of this act. In case of the neglect of such corporations to

make such pavement or repairs the local authorities may make the same at the expense of such corporation after the expiration of thirty days' notice to do so."

Section 18 of the act provides that "all acts and parts of acts, whether general or special, inconsistent with this act are hereby repealed, but nothing in this act shall . . . interfere with or repeal or invalidate any right heretofore acquired under the laws of this State by any horse railroad company or affect or repeal any right of any existing street surface railroad company to construct, extend, operate and maintain its road in accordance with the terms and provisions of its charter and the acts amendatory thereof."

The Rochester Railroad Company was incorporated for the purpose of acquiring the property of the Rochester City and Brighton Railroad Company, hereinafter called the Brighton Railroad. The Brighton Railroad was incorporated March 5, 1868, under a general law of the State of New York. Chap. 140, Laws of 1850. That law contained no provision respecting the repairs of streets, and, differences having arisen between the Brighton Railroad and the city, as to the extent of the burden of such repairs properly to be borne by the railroad, they joined in an application to the legislature for the enactment of a law which should regulate that and other subjects. Such a law was enacted February 27, 1869, and its fifth section was as follows:

"Said company shall put, keep and maintain the surface of the streets inside the rails of its tracks in good and thorough repair, under the direction of the committee on streets and bridges of the common council of said city of Rochester; but whenever any of said streets are, by ordinance or otherwise, permanently improved, said company shall not be required to make any part or portion of such improvement, or bear any part of the expense thereof, but it shall make its rails in such street or streets conform to the grade thereof."

On the 25th day of February, 1890, the Brighton Railroad duly executed and delivered a lease of its property, franchises, rights and privileges, for the unexpired term of its charter, to the Rochester Railroad, which accepted the lease and took possession of the property. Subsequently, in the same year, the Rochester Railroad acquired the entire capital stock of the Brighton Railroad. The acquisition of stock was in pursuance of the authority contained in chapter 254 of the Laws of New York of 1867, which, as amended by chapter 503 of the Laws of 1879, is as follows:

"Any railroad corporation created by the laws of this State, or its successors, being the lessee of the road of any other railroad corporation, may take a surrender or transfer of the capital stock of the stockholders, or any of them, in the corporation whose road is held under lease, and issue in exchange therefor the like additional amount of its own capital stock at par, or on such other terms and conditions as may be agreed upon between

the two corporations; and whenever the greater part of the capital stock of any such corporation shall have been so surrendered or transferred, the directors of the corporation taking such surrender or transfer shall thereafter, on a resolution electing so to do, to be entered on their minutes, become *ex officio* the directors of the corporation whose road is so held under lease, and shall manage and conduct the affairs thereof, as provided by law; and whenever the whole of the said capital stock shall have been so surrendered or transferred, and a certificate thereof filed in the office of the Secretary of State, under the common seal of the corporation to whom such surrender or transfer shall have been made, the estate, property, rights, privileges and franchises of the said corporation whose stock shall have been so surrendered or transferred shall thereupon vest in and be held and enjoyed by the said corporation, to whom such surrender or transfer shall have been made, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation to whom such surrender or transfer of the said stock shall have been made, and in the corporate name of such corporation. The rights of any stockholder not so surrendering or transferring his stock shall not be in any way affected hereby, nor shall existing liabilities or the rights of creditors of the corporation, where stock shall have been so surrendered or transferred, be in any way affected or impaired by this act."

Subsequently the Rochester Railroad duly obtained permission to convert the road into an electric trolley road, expended large sums of money in doing so, and, in the acquisition of the stock of the Brighton Railroad and the conversion of its road into an electric road, relied upon the provisions of the Act of 1869 as a contract exempting it, with respect to the streets covered by the tracks of the Brighton Railroad, from other street repairs than those therein described. The city acquiesced in this view until October, 1898, when, upon the suit of an owner of adjoining property, the Court of Appeals held that under section 9 of the Act of 1884 and section 98 of chapter 39 of the General Laws, which were regarded as substantially the same, the Rochester Railroad was bound to bear the expense of a new pavement on the location acquired from the Brighton Railroad. *Conway* v. *Rochester*, 157 N. Y. 33. Subsequently, the city repaved two streets which were within the location acquired and operated by the Brighton Railroad, prior to the passage of the Act of 1884, and, in obedience to the decision in the Conway case, assessed against the Rochester Railroad its share of the expense of pavement and brought this action to recover the amount of the assessment. It was set up in defense of the action that by the Act of 1869 the State of New York had entered into an inviolable contract with the Brighton Railroad, exempting it from the expense of pavement, that the contract had passed with the property of the Brighton Railroad to the Rochester Railroad and that the assessment was in violation of the Constitution of the United States. The con-

tentions of the Rochester Railroad were denied by the Court of Appeals of New York, (182 N. Y. 116,) which held, first, that the statute mentioned did not constitute a contract between the State and the railroad company, and, second, that if it did, the exemption granted by the statute was personal to the Brighton Railroad and did not pass to the Rochester Railroad. The case was remanded to the Supreme Court and a judgment entered pursuant to the remittitur from the Court of Appeals, and by writ of error that judgment is brought here for review.

Mr. Justice MOODY, after making the foregoing statement, delivered the opinion of the Court.

By the judgment of the highest court of the State of New York, the city of Rochester was allowed to recover from the Rochester Railroad, a street surface railroad corporation, the cost of laying new pavements on the parts of two streets which lay between the tracks, the rails of the tracks and two feet outside of the tracks of the railroad. This recovery was had under a statute of New York, which required such railroads to keep that part of the street over which their tracks ran in permanent repair. The requirement of permanent repair includes the duty of laying new pavements. *Conway* v. *Rochester*, 157 N. Y. 33.

The Rochester Railroad, not denying its liability in ordinary cases to bear the expense of paving, asserts that, with respect to the two streets in question, it was exempted from that burden by contract with the State of New York, made with its predecessor in title, the Brighton Railroad, and transferred to it with the title to the property of that railroad. The contract relied upon is found in a law enacted in 1869, for the benefit of the Brighton Railroad, which relieved that road from the burden of pavement of any part of the streets in which its tracks were situated. The Rochester Railroad claims that the law of New York, so far as that law imposes upon it the cost of the pavement of the streets in question, was in violation of that provision of the Constitution of the United States which forbids a State to pass any law impairing the obligation of contracts.

The Brighton Railroad was incorporated in 1862, under the general law of 1850, which contained no provision with respect to the railroad's share of street repairs. Until the enactment of the law of 1884, under which the Rochester Railroad was subsequently incorporated, there was no general law regulating the apportionment between street railroads and municipalities of the expense of such repairs, and the question was determined in individual cases either by agreement or a special law. Differences having arisen between the Brighton Railroad and the city of Rochester as to the share of the expense of street repair which ought to be borne by the railroad, they joined in a request for legislation which would settle this and

other disagreements. In response to that request the law of 1869 was enacted. The fifth section of the law, after providing that the railroad should put and keep the surface and street inside of the rails of its tracks in repair, enacts that: "Whenever any of said streets are by ordinance or otherwise permanently improved said company shall not be required to make any part or portion of such improvement or bear any part of the expense thereof."

This law obviously, as held by the Court of Appeals, exempted the railroad from the expense of new pavements, which is the expense sought to be recovered in this action. This was the effect conceded to the statute by the city for the whole time during which the railroad property was owned and operated by the Brighton Railroad, and even after it parted with the property, and until the decision in *Conway* v. *Rochester*, 157 N. Y. 33, in 1898. Whether this statute was a contract between the State of New York and the Brighton Railroad inviolable by the Federal Constitution, and if so, whether its benefits have been waived or it has been lawfully modified or repealed by virtue of the powers reserved by the Constitution or laws of New York, are questions which have been much argued at the bar. We do not deem it necessary in this case to decide those questions, and therefore put out of view many facts found in the record which were deemed by both parties to be relevant to them. We assume, for the purpose of our decision, that there was a contract exempting the Brighton Railroad from the expense of street pavements, and that the contract could not constitutionally be impaired by the State of New York, and that its benefits have not been waived.

It becomes therefore necessary to inquire whether the contract has been transferred with the property of the Brighton Railroad to the Rochester Railroad, the plaintiff in error.

The Rochester Railroad was incorporated for the purpose of acquiring the property of the Brighton Railroad, which was accomplished by a lease of the property, franchises, rights and privileges of the Brighton Railroad, followed by the purchase of its capital stock. This was done under the authority of a statute, which provided that a railroad corporation, being the lessee of the property of another railroad corporation, might acquire the whole of the capital stock of the latter, and in such a case its "estate, property, rights, privileges and franchises should vest in and be held and enjoyed by" the purchasing corporation. It is contended that the effect of the transfer under this law is to vest in the Rochester Railroad the exemption from the expense of street pavement which the Brighton Railroad enjoyed through the contract with the State of New York. This contention presents the question to be decided.

This court has frequently had occasion to decide whether an immunity from the exercise of governmental power which has been granted by contract to one, has by legislative authority been vested in or transferred to another, and in the decisions certain general principles, which control in the determination of the case at bar, have been established. Although the obligations of such a contract are protected by the Federal Constitution from impairment by the State, the contract itself is not property which, as such, can be transferred by the owner to another, because, being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by the State may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot by any form of conveyance transmit the contract or its benefits, to a successor. *Morgan* v. *Louisiana*, 93 U. S. 217; *Wilson* v. *Gaines*, 103 U. S. 417; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244; *Picard* v. *Tennessee &c.*, 130 U. S. 637; *St. Louis &c. Co.* v. *Gill*, 156 U. S. 649; *Norfolk & Western Railroad* v. *Pendleton*, 156 U. S. 667. But the State, by virtue of the same power which created the original contract of exemption, may either by the same law, or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken not by reason of the inherent right of the original holder to assign it, but by the action of the State in authorizing or directing its transfer. As in determining whether a contract ~~exempted~~ from a governmental power was granted, so in determining whether its transfer to another was authorized or directed every doubt is resolved in favor of the continuance of the governmental power and clear and unmistakable evidence of the intent to part with it is required.

Keeping these fundamental principles steadily in mind, we proceed to inquire whether the State of New York has authorized or directed the transfer from the Brighton Railroad to the Rochester Railroad of the contract of exemption. A legislative authorization of the transfer of "the property and franchises," (*Morgan* v. *Louisiana, ub. sup.*; *Picard* v. *Tennessee &c. Co., ub. sup.*;) of "the property," (*Wilson* v. *Gaines, ub. sup.*; *Louisville & Nashville R. R., ub. sup.*;) of "the charter and works," (*Memphis &c. Railroad Co.* v. *Commissioners*, 112 U. S. 609;) or of "the rights of franchise and property," (*Norfolk & Western Railroad Co.* v. *Pendleton, ub. sup.*,) is not sufficient to include an exemption from the taxing or other power of the State, and it cannot be contended that the word "estate" has any larger meaning. It is, however, argued that the word "privileges" is sufficiently broad to embrace within its meaning such an exemption, and that when it is added to the other words the legislative intent to transfer the exemption is clearly manifested, and that the words of the law under consideration, "the estate, property, rights, privileges and franchises," in-

dicate the purpose to vest in the purchasing corporation every asset of the selling corporation which is of conceivable value. There is authority sustaining this position, which cannot be set aside without examination.

In the case of *Humphrey* v. *Pegues*, 16 Wall. 244, it appeared that the charter of the Northeastern Railroad Company granted by the State of South Carolina originally contained no exemption from taxation, but that by amendment to the charter some years later the real estate and stock of the company were exempted from all taxation during the continuance of its charter. Subsequently the legislature granted the charter of the Cheraw and Darlington Railroad Company, and provided that "all the powers, rights and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw and Darlington Railroad Company." The State of South Carolina attempted to tax the stock and property of the Cheraw and Darlington Railroad Company, and the validity of that taxation was the question in the case. The court held that the powers, rights and privileges granted to the Cheraw and Darlington Railroad Company were those contained in the amendment of the charter, as well as those contained in the original charter, and said, by Mr. Justice Hunt: "All the 'privileges,' as well as the powers and rights, of the prior company were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others." Upon this reasoning it was held that the stock and real estate of the Cheraw and Darlington Railroad Company were exempt from taxation. See *Guter* v. *Atlantic Coast Line*, 200 U. S. 273.

In *Chesapeake & Ohio Railroad* v. *Virginia*, 94 U. S. 718, it was said that an act conferring upon a railroad corporation "the benefits of the charter" of another corporation which had an immunity from taxation, and "the rights, privileges, franchises and property" of another corporation, which when formed would have the "rights, privileges and franchises and property" of the corporation holding the immunity, was sufficient to transfer the immunity from taxation. But this expression of opinion was unnecessary to the decision of the case, which merely decided that where a railroad corporation acquired the property of another railroad corporation, to which was attached an immunity from taxation, that immunity did not extend beyond the property thus acquired. In *Southwestern Railroad Company* v. *Georgia*, 92 U. S. 676, where a statute allowed the Muscogee Railroad to unite with the Southwestern Railroad into one company, under the charter of the latter, and it was provided that "all the rights, privileges and property [of the Muscogee Railroad Company] shall be part and parcel of the Southwestern Railroad," it was held that the

immunity from taxation enjoyed by the Muscogee Railroad passed with its property to the Southwestern Railroad.

In *Tennessee* v. *Whitworth*, 117 U. S. 139, it was held that a statute conferring upon a railroad corporation "all the rights, powers and privileges" of another railroad corporation, and "all the powers and privileges" of a third railroad corporation included the immunities from taxation enjoyed respectively by the latter corporations, the ground of the decision being that an exemption from taxation is, in the common acceptation of the term, a privilege.

If the authority of these four cases, supported by some dicta which need not be cited, remained unimpaired, it would justify the opinion that a legislative transfer of the "privileges" of a corporation includes an exemption from the taxing or other governmental power granted by a contract with the State. But other and later cases have essentially modified the rule which may be deduced from them.

In the case of the *Chesapeake & Ohio Railroad Company* v. *Miller*, 114 U. S. 176. it was held that the foreclosure of a mortgage on railroad property under the provisions of a statute which authorized the purchaser under a foreclosure sale to become a corporation, and provided that it should "succeed to all such franchises, rights and privileges" as were possessed by the mortgagor company, did not vest in the purchasing corporation an immunity from taxation.

In *Picard* v *East Tennessee, Virginia & Georgia Railroad Company*, 130 U. S. 637, Mr. Justice Field, in delivering the opinion of the court, said: "The later, and, we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privileges,' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In *Wilmington Weldon Railroad Company* v. *Alsbrook*, 146 U. S. 279, Mr. Chief Justice Fuller, in delivering the opinion of the court, said on page 297: "We do not deny that exemption from taxation may be construed as included in the word 'privileges,' if there are other provisions removing all doubt of the intention of the legislature in that respect."

In *Keokuk & Western R. R. Co.* v. *Missouri*, 152 U. S. 301, Mr. Justice Brown, in delivering the opinion of the court, said: "Whether under the name 'franchises and privileges' an immunity from taxation would pass to the new company may admit of some doubt, in view of the decisions of this court, which, upon this point, are not easy to be reconciled."

These conflicting views were before the court in *Phenix Fire & Marine Insurance Company* v. *Tennessee*, 161 U. S. 174. The plaintiff in error in that case claimed to have an immunity from taxation by virtue of a provision in its charter granting it "all the rights and privileges" of the De

Soto Insurance Company, which had an immunity from taxation by virtue of a provision in its charter granting it "all the rights, privileges and immunities" of the Bluff City Insurance Company, whose charter contained an expressed immunity from taxation. Mr. Justice Peckham, in delivering the opinion of the court, stated the question for decision in these words: "Is immunity from taxation granted to plaintiff in error under language which grants 'all the rights and privileges' of a company which has such immunity?" Much significance was given to the fact that the word "immunity," which clearly includes an exemption, was used in the charter of the De Soto company and not used in the charter of the plaintiff in error, granted seven years later. But the decision was not rested on this circumstance, although the omission was thought to cast a grave doubt upon the plaintiff's claim. The opinion reviews all the cases, cites the foregoing quotations from the opinions of Mr. Justice Brown, Mr. Justice Field and of the Chief Justice, and, after saying "There must be other language than the mere word 'privilege' or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted," concludes that "If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In *Gulf & Ship Island Railroad Company* v. *Hewes*, 183 U. S. 66, Mr. Justice Brown, in delivering the opinion of the court, said, citing this case as authority: "The better opinion is that a subrogation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

We think it is now the rule, notwithstanding earlier decisions and dicta to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation, which enjoys immunity from taxation or regulation, should not be interpreted as including that immunity. We, therefore, conclude that the words "the estate, property, rights, privileges and franchises" did not embrace within their meaning the immunity from the burden of paving enjoyed by the Brighton Railroad Company. Nor is there anything in this, or any other statute, which tends to show that the legislature used the words with any larger meaning than they would have standing alone. The meaning is not enlarged, as faintly suggested, by the expression in the statute that they are to be held by the successor "fully and entirely and without change and diminution," words of unnecessary emphasis, without which all included in "estate, property, rights, privileges and franchises" would pass, and with which nothing more could pass. On the contrary, it appears, as clearly as it did in the Phenix

Fire Insurance Company case, that the legislature intended to use the words "rights, franchises and privileges" in the restricted sense. The law under which this transfer was made was enacted in 1867 and amended in 1879. In 1869 an act was passed authorizing the merger and consolidation of railroad corporations, (chap. 917, Laws of 1869,) which provided that upon the consolidation "all and singular the rights, privileges, *exemptions* and franchises should be transferred to the new corporation." In 1876 an act was passed, (chap. 446, Laws of 1876,) which authorized the purchasers of the rights, privileges and franchises of railroad corporations (except street railroad corporations) under a foreclosure sale to become a corporation, and thereupon have "all the franchises, rights, powers, privileges and *immunities*" of the corporation whose property was sold. The omission in the statute under consideration of the words "exemptions" or "immunities," either of which would be apt to transfer the immunity claimed, is significant, in view of the fact that each of these words was employed by the legislature about the same time in other statutes dealing with the transfer of corporate property, and raises a doubt of the intention of the legislature, which in cases of the interpretation of a statute claimed to divest the State of a governmental power is equivalent to a denial.

The conclusion that the exemption of the Brighton Railroad did not accompany the transfer of its property to the Rochester Railroad is reached by another and entirely independent course of reasoning, based upon a consideration of the law under which the Rochester Railroad was incorporated. That was the general incorporation law of 1884. Every corporation incorporated under it was made "subject to all the liabilities imposed by the act," (§ 1,) and directed to keep the street surface about and between its tracks "in permanent repair," (§ 9,) which, as held by the State court, includes the duty of laying such pavement as is in controversy here. We follow the construction by that court of § 9 so far as it holds that that section applies to all tracks, whether constructed under this law or any other law, owned and operated by a corporation incorporated under it. Whether the section applies, or constitutionally can apply, to a corporation not deriving its powers from the act of 1884, in respect of tracks not constructed under its provisions, it is not necessary for us to consider. There may have been a saving of the rights of such corporations under § 18. That question would be presented if the Brighton Railroad, instead of a successor in title, were claiming an exemption. Here a corporation, deriving its right to exist under the act of 1884, is asserting an exemption from a duty imposed upon it by the law which created it. The authorities are numerous and conclusive that no corporation can receive by transfer from another an exemption from taxation or governmental regulation which is inconsistent with its own charter or with the

constitution or laws of the State then applicable, and this is true, even though, under legislative authority, the exemption is transferred by words which clearly include it. *Trask* v. *McGuire*, 18 Wall. 391; *Shields* v. *Ohio*, 95 U. S. 319; *Maine Central R. R.* v. *Maine*, 96 U. S. 499; *Railroad Co.* v. *Georgia*, 98 U. S. 359; *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244; *Memphis &c. R. R.* v. *Commissioners*, 112 U. S. 609; *St. Louis &c. R. R.* v. *Berry*, 113 U. S. 465; *Keokuk &c. R. R.* v. *Missouri*, 152 U. S. 301; *Norfolk & Western R. R.* v. *Pendleton*, 156 U. S. 667; *Yazoo &c. R. R.* v. *Adams*, 180 U. S. 1; *Grand Rapids &c. R. R.* v. *Osborn*, 193 U. S. 17: *San Antonio Traction Co.* v. *Altgelt*, 200 U. S. 304.

The principle governing these decisions, so plain that it needs no reasoning to support it, is that those who seek and obtain the benefit of a charter of incorporation must take the benefit under the conditions and with the burdens prescribed by the laws then in force, whether written in the constitution, in general laws or in the charter itself. The Rochester Railroad, therefore, having accepted its charter under a law which imposed upon it the duty of laying pavements is bound to perform that duty, even in respect of tracks, which, while owned by a predecessor in title, would have been exempt.

The foregoing considerations would be conclusive of the case were it not that the plaintiff in error takes another position, which, if tenable, would avoid the result reached by either course of reasoning. It is insisted that this is not a case of transfer of an exemption; that the rules governing transfer are not applicable here; that the Brighton Railroad has not ceased to exist as a corporation; that it has been merely joined by merger with the Rochester Railroad, which controls it by stock holdings and operates it by virtue of its franchises; and that, therefore, the Rochester Railroad may claim and enjoy the exemption of the Brighton Railroad in its behalf in respect of its property. In support of this view counsel cite *Tomlinson* v. *Branch*, 15 Wall. 460; *Central Railroad* v. *Georgia*, 92 U. S. 665; *Tennessee* v. *Whitworth*, *ub. sup.* These cases hold that where corporations are united in such manner that one continues to exist as a corporation, owning and operating its property, by virtue of its own charter, the corporation thus continuing to exist still holds its immunities and exemptions in respect of the property to which they apply. But the cases have no application here. It may well be that a proceeding for condemnation of property, begun by the Brighton Railroad, would not abate by reason of its consolidation with the Rochester Railroad, as held in 43 State Reporter, 651, affirmed 133 N. Y. 690. An examination, however, of the statute under which the union of the two corporations was made, and the transactions by which the union was accomplished, shows that the Brighton Rail-

road has ceased to exist as a corporation. The Rochester Railroad first took a lease of the Brighton Railroad, apparently for the purpose of bringing itself within the provisions of the act of 1879. Then all the stock of the latter corporation was acquired by exchange of shares of stock of the former corporation. Then a certificate of the transfer of stock was filed with the Secretary of State. Thereupon, by operation of the law, the "estate, property, rights, privileges and franchises" of the Brighton Railroad vested in the Rochester Railroad, to be thereafter controlled by the Rochester Railroad in its own corporate name. The law does not expressly dissolve the selling corporation, but it leaves it without stock, officers. property or franchises. A corporation without shareholders, without officers to manage its business, without property with which to do business, and without the right lawfully to do business, is dissolved by the operation of the law which brings this condition into existence. *Maine Central Railroad* v. *Maine, ub. sup.; Keokuk &c. Railroad* v. *Missouri, ub. sup.; Yazoo &c. Railroad, ub. sup.*

The judgment of the Supreme Court of New York is, therefore,

Affirmed.

Mr. Justice WHITE concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.